

CHAPTER 2

Key issues

2.1 This inquiry generated a high level of public interest and the committee recognises the policy arguments raised by submitters and witnesses during the course of this inquiry.

2.2 The focus of this inquiry was the Recognition of Foreign Marriages Bill 2014 rather than marriage equality more broadly. Therefore, this chapter briefly discusses the question of marriage equality before addressing key issues raised by submitters and witnesses with regard to the Bill. It also discusses certain issues faced by intersex Australians.

Marriage equality

2.3 The majority of the submissions received by the committee contained general arguments for and against marriage equality, as opposed to addressing the specific provisions of the Bill. The arguments put forward were similar in nature to the main arguments raised with regard to the Marriage Equality Amendment Bill 2010 during the 2012 Senate committee inquiry.¹

2.4 Submitters supportive of same-sex marriage argued that:

- marriage equality would address the inequality and discrimination felt by same-sex couples in not being allowed to marry;
- same sex couples have a right to marry and a right to non-discrimination at international law;
- public opinion is in favour of allowing same-sex couples the right to get married;
- marriage equality for same-sex couples has been recognised in a number of overseas jurisdictions;
- marriage will greatly benefit the health of lesbian, gay, bisexual, transgender and intersex people; and
- the amendments are in the best interests of children of same-sex couples.²

1 Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010*, June 2012, pp 11-36.

2 See, for example: New South Wales Gay and Lesbian Rights Lobby, *Submission 1*, p. 1; Youth Family Services Ltd, *Submission 15*, pp 2-3; Law Society of New South Wales, *Submission 17*, pp 1-2; Australian Marriage Equality, *Submission 19*, pp 3-5; Human Rights Law Centre, *Submission 20*, pp 2-3; Australian Lawyers for Human Rights, *Submission 21*, pp 1-2; Victorian Gay and Lesbian Rights Lobby, *Submission 22*, pp 1-3; Parents & Friends of Lesbians and Gays, *Submission 27*, pp 2-6; Australian Psychological Society, *Submission 30*, pp 4-8; National LGBTI Health Alliance, *Submission 33*, pp 1-5; Freedom to Marry, *Submission 36*, pp 1-5.

2.5 Submitters opposed to same-sex marriage argued that:

- marriage should remain between a man and a woman;
- children have a right to both a mother and a father;
- the majority of Australians do not support marriage equality;
- the issue has already been debated by the Parliament;
- it is not discrimination to restrict marriage to between a man and a woman;
- international law does not provide a right for same-sex couples to marry; and
- allowing same-sex marriage would be a "slippery slope" for other forms of marriage.³

Committee comment

2.6 As stated above, the purpose of this inquiry was not to consider the merits or otherwise of marriage equality in Australia and the committee does not intend to address those matters in its report. However, as many witnesses noted, the issue of same-sex marriage has already been considered by the Parliament and the committee is not persuaded that this inquiry has yielded any new material that speaks to the issue.

Key issues arising from the Bill

2.7 During the course of the inquiry, submitters and witnesses identified a number of issues with regard to the Bill. These included:

- whether the Bill was a surreptitious attempt to introduce marriage equality in Australia;
- differential treatment of domestic same-sex partnerships versus overseas same-sex marriages, and whether the provisions of the Bill would result in economic discrimination between those who can afford to travel and those that cannot;
- that other jurisdictions have recognised same-sex marriage and whether this should influence Australia's position on the issue;
- the impact the Bill would have on religious freedom;
- whether the Bill would address some of the family law and migration issues currently facing same-sex couples or instead create more uncertainty;

3 See, for example: Australian Family Association, *Submission 2*, pp 4-5; Endeavour Forum Inc., *Submission 3*, p.1; Presbyterian Church of Tasmania, *Submission 6*, pp 1-2; Catholic Archdiocese of Sydney, *Submission 7*, pp 1-4; Australian Christian Lobby, *Submission 9*, pp 3-4; National Marriage Coalition, *Submission 12*, pp 11-20; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, pp 4-8; Presbyterian Church of Australia, *Submission 23*, pp 1-4; Family Voice Australia, *Submission 31*, pp 1-13; Australian Catholic Bishops Conference, *Submission 32*, pp 2-4.

- whether the amendment would be contrary to Australia's obligations under international law; and
- whether the Bill represented a "slippery slope" to allowing the recognition of other types of marriage (for example polygamy and child marriage).

2.8 These issues are discussed in the following sections.

Attempt to introduce marriage equality in Australia

2.9 Some submitters expressed concern that the Bill was a surreptitious attempt to introduce marriage equality in Australia.⁴ The Australian Christian Lobby (ACL) described the Bill as 'intended to be a different path to redefine marriage in Australian law'.⁵ A number of submitters suggested that the title of the Bill was misleading, as foreign heterosexual marriages are already recognised in Australia and the Bill only goes to foreign same-sex marriages.⁶

2.10 The National Marriage Coalition stated:

We would say that, if marriage equality or same-sex marriage is to be debated, it should be debated as a separate issue, not in this step-by-step approach...⁷

2.11 The ACL argued that the Bill 'shows contempt for Australia's democratic processes'⁸ and pointed out that the issue of marriage equality had already been debated a number of times in various legislative forms:

A bill to recognise foreign same-sex marriages was defeated in the Senate just last year. There have been at least 11 attempts at state or territory level to legislate a new definition of marriage. All have failed. A House of Representatives committee in 2012 declined to support same-sex marriage. There have been three Senate inquiries since 2010. There have been numerous state parliamentary inquiries in the past two years, all followed by votes opposing changing the definition of marriage. The exception was the ACT Legislative Assembly, where nine people voted to set a precedent

4 National Marriage Coalition, *Submission 12*, p. 4; Australian Christian Lobby, *Submission 9*, pp 5-6; The Australian Family Association, *Submission 2*, p. 3; Catholic Archdiocese of Sydney, *Submission 7*, p. 3; Catholic Women's League of Australia Inc., *Submission 28*, p. 1; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 3; Australian Baptists Ministries, *Submission 8*, pp 2-3.

5 Australian Christian Lobby, *Submission 9*, p. 5.

6 National Marriage Coalition, *Submission 12*, p. 4; Australian Christian Lobby, *Submission 9*, pp 5-6; The Australian Family Association, *Submission 2*, p. 3; Catholic Archdiocese of Sydney, *Submission 7*, p. 3; Catholic Women's League of Australia Inc., *Submission 28*, p. 1; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 3; Australian Baptists Ministries, *Submission 8*, pp 2-3.

7 Mrs Jenny Stokes, Representative, National Marriage Coalition, *Committee Hansard*, 21 August 2014, p. 18.

8 Australian Christian Lobby, *Submission 9*, p. 5.

for the nation, which was obviously later overturned by the High Court as unconstitutional. ACL, in approaching this inquiry, facilitated 42,000 signatures on a submission to this inquiry.⁹

2.12 In response to these claims, Senator Hanson-Young acknowledged that the Bill was quite plainly aimed at furthering the case for marriage equality in Australia.¹⁰ A number of submitters supported the Bill on this basis because 'it will move Australia closer to a position of marriage equality'.¹¹

2.13 Some submitters argued that there was no reason the Bill could not be debated on its own merits.¹² The New South Wales Gay and Lesbian Rights Lobby stated that the policy issue of marriage equality generally and the provisions of the Bill were separate issues.¹³

2.14 Australian Marriage Equality concurred. Mr Rodney Croome, National Director, stated:

Firstly, we can deal with this separately; there are no constitutional barriers to dealing with this issue. One of the reasons, certainly in my experience, that same-sex couples marry overseas is that they have a sense of urgency. The partners might be ageing and wish to marry before they die, or they may have children to whom they wish to provide the benefits of marriage before those children grow up, which was the case with the couple I mentioned earlier who married in Auckland.¹⁴

Differential treatment and discrimination

2.15 Another issue raised by some submitters was the differential treatment of domestic same-sex partnerships versus same-sex marriages solemnised overseas and potential discrimination against certain same-sex couples.¹⁵

2.16 The Law Council of Australia was concerned that the Bill would create "economic" discrimination by establishing a situation where same-sex couples with

9 Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 21 August 2014, p. 48.

10 Senator Hanson-Young, *Committee Hansard*, 21 August 2014, p. 47.

11 Law Institute of Victoria, *Submission 39*, p. 1; Law Society of New South Wales, *Submission 17*, p. 1; New South Wales Gay and Lesbian Rights Lobby, *Submission 1*, p. 1; Human Rights Law Centre, *Submission 20*, p. 1.

12 Civil Liberties Australia Inc., *Submission 11*, p. 2; Australian Lawyers for Human Rights, *Submission 21*, p. 4; Tasmanian Gay and Lesbian Rights Group, *Submission 46*, p. 3.

13 Dr Justin Coonan, Co-convenor, New South Wales Gay and Lesbian Rights Lobby, *Committee Hansard*, 21 August 2014, p. 3.

14 Mr Rodney Croome, National Director, Australian Marriage Equality, *Committee Hansard*, 21 August 2014, p. 3.

15 Australian Christian Lobby, *Submission 9*, p. 5; National Marriage Coalition, *Submission 12*, pp 4-5; Catholic Archdiocese of Sydney, *Submission 7*, p. 2; Australian Baptists Ministries, *Submission 8*, pp 3-4; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 2; Australian Sex Party, *Submission 50*, p. 1

the financial resources to travel overseas would have access to same-sex marriage whilst same-sex couples without those financial resources would be denied access to same-sex marriage. On that basis, the Law Council submitted that the Bill would create a serious 'discriminatory effect':

The dichotomy that the Bill would create if passed in its current form is likely to be problematic and result in confusion.

Furthermore, it would create a situation in which same sex couples who are able to travel overseas and marry can have their marriages recognised in Australia, while others may not be able to do so, due to the expense involved or other factors such as disability or age.¹⁶

2.17 The Attorney-General's Department noted in its submission that:

The passage of the Bill will result in differential treatment for same-sex marriages solemnised overseas in contrast to same-sex partnerships recognised pursuant to some State and Territory laws.¹⁷

2.18 Other submitters acknowledged this concern but on balance supported the Bill¹⁸ on the grounds, for example, that the Bill was 'a first step towards marriage equality in Australia'.¹⁹ Yet other submitters argued that discrimination already exists towards same-sex couples and the benefits of the Bill would outweigh the concerns around economic discrimination.²⁰

Overseas jurisdictions

2.19 Some supporters of the Bill, such as Australian Marriage Equality, argued that due to the significant number of countries recognising same-sex marriage, the amendments in the Bill were necessary in order to ensure that those couples that marry overseas are not faced with having to choose between their nationality and their marriage.²¹

2.20 Mr Croome stated that there had been an increase in the number of Australian same-sex couples marrying overseas since the last time the Senate considered the issue of marriage equality:

What has changed is that an increasing number of Australian couples are marrying overseas, particularly in jurisdictions that are very similar to Australia's and where a large number of Australians reside, and that

16 Law Council of Australia, *Submission 4*, p. 1.

17 Attorney-General's Department, *Submission 41*, p. 2.

18 Tasmanian Gay and Lesbian Rights Group, *Submission 46*, p. 3.

19 Law Institute of Victoria, *Submission 39*, p. 1.

20 Mr Corey Iram, Co-convenor, New South Wales Gay and Lesbian Rights Lobby, *Committee Hansard*, 21 August 2014, p. 8; Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 14.

21 Australian Marriage Equality, *Submission 19*, p. 4; National LGBTI Health Alliance, *Submission 33*, p. 3.

includes New Zealand and Britain. So, the problem that already existed has magnified...²²

2.21 In addition, Australian Marriage Equality argued that 'the number of jurisdictions allowing same-sex couples to marry is growing rapidly' and provided information on countries that currently allow or will soon allow same-sex couples to marry.²³

2.22 The Law Institute of Victoria (LIV) noted that there are currently five countries which do not allow same-sex marriage domestically but do recognise foreign same-sex marriages:

...Israel, Japan, Italy, Malta and the Netherlands Antilles. They do for same-sex marriage what your bill will do for marriage equality. They do not allow it, just like we do not allow it. But they recognise it, as we should.²⁴

2.23 Other submitters argued that Australia should not feel compelled into action by the actions of other nations. For example, the ACL argued that 'Australia is a sovereign nation responsible for its own policies':

The fact that New Zealand, the UK, and a small group of other countries have legislated to redefine the most fundamental relationship in society does not compel Australia to follow suit.²⁵

2.24 The National Marriage Coalition noted that only 16 out of the 193 United Nations member states have legislated for same-sex marriage.²⁶ It argued that this is less than 10 per cent of countries, 'hardly a landslide of opinion'.²⁷

2.25 The Catholic Archdiocese of Sydney submitted that the Bill attempted to circumvent Australia's democratic process and that adoption of 'a foreign definition of marriage' would undermine Australian law:

It is unjust and underhand that the Bill attempts to change the meaning of marriage for all Australians whilst purporting to do so only for a small number of same-sex couples.²⁸

Religious freedom

2.26 The impact of the Bill on the right of organisations and individuals to uphold their religious beliefs was of concern to some submitters.²⁹

22 Mr Rodney Croome, National Director, Australian Marriage Equality, *Committee Hansard*, 21 August 2014, p. 3.

23 Australian Marriage Equality, *Submission 19*, p. 3.

24 Mr Jamie Gardiner, Member of Human Rights Committee and LIVout Working Group, Law Institute of Victoria, *Committee Hansard*, 21 August 2014, p. 42.

25 Australian Christian Lobby, *Submission 9*, p. 6.

26 National Marriage Coalition, *Submission 12*, p. 5.

27 National Marriage Coalition, *Submission 12*, pp 9-10.

28 Catholic Archdiocese of Sydney, *Submission 7*, pp 2-3.

2.27 The ACL argued that:

...there is a big threat to freedom of belief and freedom of conscience that flows as a result of a change in the legal definition of marriage. And I must say that this is of major concern to the Christian constituency in this nation.³⁰

2.28 A number of submitters referred to cases overseas where small businesses that refused to supply their services to same-sex couples were prosecuted under anti-discrimination laws.³¹ At the public hearing, Lawyers for the Preservation of the Definition of Marriage remarked that:

Our point is more in what we call the butcher, baker and candlestick maker cases, which is the people who are downstream in the religious faith community: so those like the camp that is being talked about, those who will not do the wedding cake, those who will not take photographs, those who will not hire out the hall and those who will not let out their accommodation because of fundamental conscientious beliefs.³²

2.29 Mr Shelton from the ACL also referred to some specific examples:

Our submission also references the florist in Washington state, the photographer in New Mexico and the baker in Colorado, who have all faced or are currently facing serious legal sanctions because of their conscientious objection into participating in same-sex weddings—and there are many more.³³

2.30 Conversely, the Law Society of New South Wales argued that section 47 of the Marriage Act provided sufficient protection for religious ministers who did not wish to solemnise same-sex marriages.³⁴ The Human Rights Law Centre (HRLC) shared this view, stating:

Our position is that the Marriage Act currently preserves religious freedom in the sense that it recognises the autonomy of religious organisations and their ability to undertake religious ceremonies and it does not require them to perform marriages that do not accord with their beliefs. Nothing in this bill will change that. Marriage is a civil institution and, as such, marriage

29 The Australian Family Association, *Submission 2*, pp 5-7; Australian Christian Lobby, *Submission 9*, p. 12; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, pp 7-8

30 Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 21 August 2014, p. 50.

31 The Australian Family Association, *Submission 2*, pp 5-7; Australian Christian Lobby, *Submission 9*, pp 12-15; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, pp 7-8.

32 Professor Neville Grant Rochow SC, Founder, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 21 August 2014, p. 29.

33 Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 21 August 2014, pp 48-49.

34 Law Society of New South Wales, *Submission 17*, p. 2.

performed by civil celebrants should not be affected by religious views, whatever they may be.³⁵

2.31 In respect of the overseas cases cited by some submitters and witnesses, the LIV stated that such cases occurred in overseas jurisdictions and therefore did not apply under Australia's anti-discrimination law.³⁶

Family law and migration

2.32 During the course of the inquiry, some submitters and witnesses raised issues related to family law and migration.³⁷

Family law

2.33 Some submitters were concerned about legal ambiguity under Australian family law in the current circumstances where foreign same-sex marriages are not recognised, whilst others believed passage of the Bill would exacerbate these problems. For example, the HRLC discussed the matter of separation and divorce:

In certain circumstances, the lack of recognition of foreign marriages in Australia can have the cruel effect of denying people access to divorce and separation if they are, or have become, Australian citizens. Clients of community legal centres have found themselves in what is, effectively, a legal void. This can have a profound impact on individuals. The result for some has been that they continue to have legal obligations to a former spouse who continues to reside in their former country. This included continuity of claims to the (now Australian) spouse's estate in that former country.³⁸

2.34 The HRLC argued that passage of the Bill would 'resolve many legal and practical uncertainties and complexities':

It is worth pointing out that, despite lack of recognition under the Marriage Act, our family law recognises overseas same-sex marriages for the purposes of property settlement and parenting issues. Our family law also recognises same-sex couples as parents.³⁹

2.35 By contrast, the Australian Family Association opined that passage of the Bill would create inconsistency and confusion and, contrary to the views of the HRLC,

35 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 14.

36 Mr Jamie Gardiner, Member of Human Rights Committee and LIVout Working Group, Law Institute of Victoria, *Committee Hansard*, 21 August 2014, p. 42.

37 Human Rights Law Centre, *Submission 20*, pp 2-3; Civil Liberties Australia Inc., *Submission 11*, p. 2; National LGBTI Health Alliance, *Submission 33*, pp 2-3; Victorian Gay and Lesbian Rights Lobby, *Submission 22*, p. 3; Australian Marriage Equality, *Submission 19*, pp 4-5.

38 Human Rights Law Centre, *Submission 20*, pp 2-3.

39 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 12.

would further complicate family law matters for those in a same-sex marriage solemnised overseas and recognised in Australia.⁴⁰

Spousal visas

2.36 The Victorian Gay and Lesbian Rights Lobby voiced concern about current spousal visa arrangements for same-sex couples, in particular the evidentiary burden placed on couples in a de facto relationship:

The spousal visa requirements if you are in a registered relationship or a marriage are waived of any time limit. If you are in a de facto relationship or the law only recognises you as a de facto relationship, which is how the law would treat these same-sex couples who are married overseas, they have to be together for two years and have to be able to prove the existence of the relationship. It is a much higher burden that they are placed with than a married couple.⁴¹

2.37 In response to written questions on notice, the Department of Immigration and Border Protection (DIBP) informed the committee that 'there is no difference between the types of visa applied for by a married couple or a de facto couple':

The "spouse" or "de facto partner" of an eligible Australian sponsor (Australian citizen, permanent resident or eligible New Zealand citizen) may apply for a Partner visa. Same-sex marriages are not recognised under the Australian Marriage Act 1961. Same-sex couples who have been legally married overseas may still apply for a Partner visa, the only difference being that the applicant will be assessed as a "de facto partner", rather than a "spouse". This has no impact on the assessment or the outcome of the Partner visa application, which depends on whether an applicant meets all of the relevant criteria.⁴²

2.38 In response to a question about evidentiary requirements, DIPB provided the following information:

When assessing a spouse or de facto partner relationship for the purpose of a Partner visa, officers must, by law, consider all the circumstances of the relationship, including the:

- a) financial aspects of the relationship;
- b) nature of the household;
- c) social aspects of the relationship; and
- d) nature of the couple's commitment to each other

40 Mrs Terri Kelleher, National President, Australian Family Association, *Committee Hansard*, 21 August 2014, p. 16.

41 Mr Corey Iram, Co-convenor, New South Wales Gay and Lesbian Rights Lobby, *Committee Hansard*, 21 August 2014, p. 4.

42 Department of Immigration and Border Protection, *Response to Written Questions on Notice*, 15 September 2014, p. 1.

Examples of supporting evidence include but are not limited to statutory declarations from the couple as well as third parties and evidence of financial arrangements.

A marriage certificate alone is not sufficient to meet the requirements of being a "spouse" for visa purposes. In addition to being married, the Migration Act requires couples to:

- have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- be in a genuine and continuing relationship; and
- live together or not live separately and apart on a permanent basis.

Generally, a marriage that is recognised as valid in the country in which it is solemnised will be recognised under Australian law. There are some exceptions, however, such as same sex and polygamous marriages.⁴³

2.39 DIBP noted that these requirements for de facto couples do not change, regardless of whether the couple has registered their relationship.⁴⁴

International law

2.40 Submitters and witnesses both for and against the Bill raised concerns with regard to Australia's international law obligations.

2.41 Submitters in favour of marriage equality argued that current section 88EA of the Marriage Act may contravene Article 9 of the *Hague Convention on the Recognition and Celebration of Marriages* (the Hague Convention).⁴⁵

2.42 At the public hearing, the HRLC commented:

The discrimination that characterises Australia's current marriage laws offends international human rights standards and the obligation for Australia to uphold the principles of non[-]discrimination and equality before the law. However, the issues raised by this particular bill go further. As a matter of international comity, Australia should recognise validly formed marriages from overseas, regardless of the sex or gender of the couple. We are a signatory to the Hague Convention on the Celebration and Recognition of Foreign Marriages and it is our obligation under that convention to recognise those marriages.⁴⁶

43 Department of Immigration and Border Protection, *Response to Written Questions on Notice*, 15 September 2014, pp 1-2.

44 Department of Immigration and Border Protection, *Response to Written Questions on Notice*, 15 September 2014, p. 2.

45 Law Council of Australia, *Submission 4*, p. 2; Australian Lawyers for Human Rights, *Submission 21*, pp 2-4; Law Institute of Victoria, *Submission 39*, p. 1; Human Rights Law Centre, *Submission 20*, p. 2.

46 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 11.

2.43 It was also argued that the Marriage Act 'directly discriminates on the grounds of sexual orientation in denying same-sex couples the right to marry'⁴⁷ and therefore breaches Australia's obligations under the *International Covenant on Civil and Political Rights* (the ICCPR).⁴⁸

2.44 Submitters who opposed the Bill argued that it was not discriminatory under human rights law for marriage to be restricted to between a man and a woman.⁴⁹

2.45 The Catholic Archdiocese of Sydney submitted that Article 23 of the ICCPR does not encompass same-sex marriage:

...international law has always recognised the truth that marriage is a union of a man and a woman orientated to the begetting and nurturing of children. As the United Nations Human Rights Committee has affirmed, the "right to marry and found a family", expressed in Article 23 and elsewhere, "implies, in principle, the possibility to procreate".⁵⁰

2.46 Lawyers for the Preservation of the Definition of Marriage similarly argued that Article 23 of the ICCPR does not give rise to the right for same-sex couples to marry:

The case was inviting the court to revisit the question of whether there is a right under the European covenants to same-sex marriage. That had been ventilated previously and it had been decided that there was no such right under any of the covenants that prevail in the European Union, which are obviously analogous to those that are provided for at the UN level as well.⁵¹

2.47 The Australian Christian Lobby claimed that the Hague Convention was never intended to apply to same-sex marriages in Australia⁵² while the Presbyterian Church of Australia stated that the Bill would be in conflict with Australia's obligations under the Convention on the Rights of the Child.⁵³

47 Australian Lawyers for Human Rights, *Submission 21*, p. 1.

48 Human Rights Law Centre, *Submission 20*, p. 2; Law Society of New South Wales, *Submission 17*, pp 1-2; Law Institute of Victoria, *Submission 39*, p. 1; Castan Centre for Human Rights Law, *Submission 29*, pp 2-3; Australian Lawyers for Human Rights, *Submission 21*, pp 1-2.

49 Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 7; Catholic Archdiocese of Sydney, *Submission 7*, pp 3-4.

50 Catholic Archdiocese of Sydney, *Submission 7*, p. 3.

51 Professor Neville Grant Rochow SC, Founder, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 21 August 2014, p. 28.

52 Mr Lyle Shelton, Managing Director, Australian Christian Lobby, *Committee Hansard*, 21 August 2014, p. 49.

53 Reverend Darren Middleton, Convenor of the Church and Nation Committee, Presbyterian Church of Australia, *Committee Hansard*, 21 August 2014, p. 47.

The "slippery slope"

2.48 It was the view of some submitters that the recognition of foreign same-sex marriages in Australia would lead to other types of relationships, such as polygamous marriage and marriage to minors, also being recognised.⁵⁴

2.49 At the public hearing, the National Marriage Coalition raised this concern:

We also say that other groups could seek to have their foreign marriages recognised, and the Marriage Act is very clear in that it recognises foreign marriages that are legal in Australia. That is already the case, even though the name of the bill might not suggest that. So the Marriage Act currently recognises foreign marriages that are legal.⁵⁵

2.50 In its submission the ACL listed a number of unions that are recognised in other countries (child marriage, polygamy and polyamory) and argued that while the focus of the Bill was same-sex marriages, it was unlikely to be limited to such marriages in practice.⁵⁶

2.51 These claims were refuted by supporters of the Bill. The Victorian Gay and Lesbian Rights Lobby pointed out that 'that every single lesbian, gay, bisexual, transgender and intersex reform for the last 30 years we have been having this discussion on things always has an attack of slippery slope attached to it, and not one of those predictions have ever come true in those 30 years'.⁵⁷

2.52 Australian Marriage Equality stated that such concerns have not borne out in other countries where same-sex marriage is recognised:

In the world at the moment marriage equality prevails in almost 20 jurisdictions, the combined population of which is hundreds and hundreds of millions of people, and yet the Australian Christian Lobby can only find one example where there was legal recognition of a polygamous relationship in a country that does not otherwise have that cultural tradition.⁵⁸

Committee comment

2.53 The committee heard a range of views canvassing the broader issue of marriage equality and the definition of marriage. This, however, was not the purpose of this inquiry despite those on both sides of the debate acknowledging during the

54 Australian Christian Lobby, *Submission 9*, p. 10; Catholic Archdiocese of Sydney, *Submission 7*, p. 3; Australian Baptists Ministries, *Submission 8*, p. 3; Lawyers for the Preservation of the Definition of Marriage, *Submission 18*, p. 3

55 Mrs Jenny Stokes, Representative, National Marriage Coalition, *Committee Hansard*, 21 August 2014, p. 18.

56 Australian Christian Lobby, *Submission 9*, pp 6-10.

57 Mr Corey Iram, Co-convenor, New South Wales Gay and Lesbian Rights Lobby, *Committee Hansard*, 21 August 2014, p. 7.

58 Mr Rodney Croome, National Director, Australian Marriage Equality, *Committee Hansard*, 21 August 2014, p. 2.

course of the inquiry that the Bill is an intended step towards the wider goal of legislated marriage equality. In the committee's view, marriage equality is an issue that should be addressed honestly and directly in the context of wider debate, not through attempts to address the issue incrementally.

2.54 The committee notes that passage of the Bill would legislate a form of discrimination in that same-sex couples able to marry overseas would be afforded a different set of rights to Australian same-sex couples who under domestic law would be unable to marry.

2.55 The committee recommends that the Bill not be passed as it appears to have been introduced as a vehicle to progress marriage equality more generally, rather than the specific amendment proposed. While the inquiry did reveal some issues which should be addressed by the Commonwealth government at the appropriate time and in the appropriate forum—for example matters relating to family law and migration—it is not within the terms of reference of this inquiry to address those issues. The committee nonetheless urges the government to give these matters due consideration.

Recommendation 1

2.56 The committee recommends that the Bill not be passed.

Issues facing intersex Australians

2.57 A number of submitters and witnesses to the inquiry raised issues particular to intersex Australians and acknowledged that even if the Bill were passed, in its current form it would not allow for intersex Australians to marry.⁵⁹

2.58 Organisation Intersex International Australia Limited explained what the term intersex encompassed:

In this regard, we note that intersex is a term that relates to a range of physical traits or variations that lie between ideals of male and female. Intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male. Many forms of intersex exist; it is a spectrum or umbrella term, rather than a single category. It can include differences in the number of sex chromosomes, different tissue responses to sex hormones, or a different hormone balance. Examples of intersex variations include Androgen Insensitivity Syndrome (AIS), Congenital Adrenal Hyperplasia (CAH), 5 alpha Reductase Deficiency, and sex chromosome differences such as 47, XXY (often diagnosed as Klinefelter Syndrome) and 45, XO (often diagnosed as Turner Syndrome).⁶⁰

59 Organisation Intersex International Australia Limited, *Submission 26*, p. 1; Law Institute of Victoria, *Submission 39*, p. 2; Law Society of New South Wales, *Submission 17*, p. 2; Human Rights Law Centre, *Submission 20*, p. 3; Australian Marriage Equality, *Submission 19*, p. 6; ACON, *Submission 35*, p. 1; Australian Sex Party, *Submission 50*, p. 1

60 Organisation Intersex International Australia Limited, *Submission 26*, p. 1.

2.59 During its inquiry, the committee heard evidence from Tony Briffa, Vice-President of both Organisation Intersex Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc. Tony referred to her own circumstances:

I was born with a biological intersex variation. Doctors refer to this as "Disorder of Sex Development" (specially "Androgen Insensitivity Syndrome" in my case) but essentially it means that I was born with a natural variation that resulted in being born with biological attributes of both sexes. As a result of my biological variation and the way it was treated by doctors, I have lived as a woman and a man at various times in my life though I was raised as a girl. (I have also had Victorian birth certificates that reflect my sex as female, male and nothing). I am extremely comfortable with who I am and am open about being an intersex person in all aspects of my life. Like most Australians, I identify in line with my biology at birth; I am both female and male.⁶¹

2.60 Tony explained that even if the Bill was passed, her marriage to her partner in New Zealand would still not be recognised in Australia due to the terminology used:

The bill before us is important to me. It is particularly about same-sex marriages solemnised in foreign countries. It assumes that people are either male or female. In Australia marriage is between a man and a woman to the exclusion of all others. This bill would allow marriages from overseas solemnised between two women or two men to also be recognised in Australia. The problem we have is that, for some people like me, it is not as easy as that, it is not as black and white as that.

I got married in New Zealand 11 months ago. I have my marriage certificate here, which I will table, and you will see on that certificate that my sex on my marriage certificate is not male or female. It says 'indeterminate'. I would have preferred, personally, that the sex would have reflected more accurately my sex, being part male and part female. They do have an option of 'indeterminate' in New Zealand and I chose that option, because that more accurately reflects me. I am fierce about being true to myself. I do not want to have to pretend, particularly in legal documentation, that I am one or the other, because I would be denying a part of myself.⁶²

2.61 Tony noted that she and her partner's marriage would be recognised in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand and a few other countries, though not Australia.⁶³ She argued that even if the

61 Tony Briffa, *Submission 26*, p. 1.

62 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 33.

63 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 35.

Bill were passed, she would be 'one of the few people in Australia that cannot actually be legally married'.⁶⁴

2.62 She further pointed out that the Marriage Act as it currently stands is not clear with regards to whom she would be allowed to marry:

In fact, it is a terrible situation. I technically could have married my wife in Australia but I would have had to have been a man to do it. I would have to forget the female part of me, accept the male part of me, have a male birth certificate—and I have had a female birth certificate, a male birth certificate and a blank birth certificate—be in a heterosexual relationship and have that recognised to be able to marry in Australia. I could have married her that way, but I am not her husband. Physically, if you like, I am not her husband, so it would be very strange. I would always be worried about what that would mean in the future. Would someone invalidate my marriage if I get older and am in a nursing home or have had a car accident, because when I go to a nursing home or a hospital they would be able to identify that I am not male?⁶⁵

2.63 The HRLC acknowledged the difficulties faced by intersex Australians:

...that as a society we need to be more aware of the particular circumstances of transgender people, gender diverse people and intersex people that do not neatly fall into the categories of male and female. Some of our laws have been set up in a way that have really negative impacts for these people.⁶⁶

2.64 The HRLC also discussed how the Bill could be amended to ensure that the marriages of transgender, gender diverse and intersex people would be recognised under Australian law:

When we say a man and another man and a woman and another woman what a man and what a woman is under Australian law is not clear, particularly after the Norrie case, and we have seen moves in other states and territories that do recognise the greater diversity in sex and gender that does exist outside those strict categories. By using the words "two people" we can be sure that we are fully inclusive of anyone who is transgender, gender diverse or intersex and does not identify as purely male or female or may not fit within a legal definition of those concepts.⁶⁷

64 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 35.

65 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 34.

66 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 15.

67 Ms Anna Brown, Director of Advocacy and Strategic Direction, Human Rights Law Centre, *Committee Hansard*, 21 August 2014, p. 15.

2.65 Tony also drew the committee's attention to other situations where intersex people are not properly or accurately recognised, such as passports and birth certificates. Australian birth certificates currently only allow for gender to be identified as 'man', 'woman' or 'indeterminate', while passports allow intersex people to have their gender listed as 'X'.⁶⁸ Tony explained why these options are unsuitable:

Like all intersex people, I consider myself to be one of the few classes of people in this country who cannot have a birth certificate which recognises what they are. Even a trans person, a person who is born one sex and identifies with the other and starts living as that opposite sex, they can get a birth certificate which recognises their affirmed sex. I am biologically born this way but I cannot have a birth certificate that acknowledges what I am because birth certificates at the moment require that you can only be one of the other or you could have 'indeterminate'. I am not indeterminate; I know what I am. My issue with the X personally is that it sets up a situation where you have males, you have females and then you have something that is outside of that—you have an X. I am not outside of that. I know what I am. I am actually part male and part female. That is why I do not particularly like the X.⁶⁹

Committee comment

2.66 The committee is concerned by the issues raised in relation to the recognition of marriages for intersex people, as well as their recognition in Australian birth certificates and passports.

2.67 Whilst the recognition of intersex people in Australian birth certificates and passports is not germane to the terms of the Bill subject to this inquiry, the committee urges the Commonwealth government to give further consideration to the evidence of Tony Briffa regarding intersex rights and intersex marriage and to how these issues can be addressed.

Senator the Hon Ian Macdonald Chair

68 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 36.

69 Tony Briffa, Vice President, Organisation Intersex International Australia Limited and Androgen Insensitivity Syndrome Support Group Australia Inc., *Committee Hansard*, 21 August 2014, p. 34, 36.