

CHAPTER 3

The case for legalising same-sex marriage

3.1 The case for allowing the recognition of same-sex marriage under the Marriage Act took a number of angles, some of which overlapped. This chapter aims to convey a flavour of the main arguments put to the committee, the majority of which are premised on the idea that two people who are willing and able to make a life-long commitment to each other in the eyes of society and the law, should not be stopped from doing so merely because they are the same-sex. It is to this primary argument of the need to ensure fundamental equality that the chapter now turns.

Equality

3.2 Perhaps the most prominent argument put by those in support of the Bill centred on the need to treat people as equals, regardless of their sexual preference, and to recognise and respect the equality of a commitment between people of the same-sex and people of different sexes.¹ A number of witnesses referred to the recent reforms by the Government aimed at redressing the inequities, and all were in support of them. However, witnesses in support of the Bill predictably went on to argue that the reforms did not go far enough.

3.3 Dr Paula Gerber from the Castan Centre for Human Rights Law, for example, submitted that:

There have recently been a suite of reforms that have removed discrimination against gays and lesbians in the areas of taxation, superannuation and social security—the last bastion is marriage. In accordance with international human rights law, principles of non discrimination and equality, this too must be addressed. Civil unions and domestic partner registries are not sufficient. They are the equivalent of the ‘separate but equal’ response in America in the era of segregation, and we know from that time that that does not result in uniform enjoyment of human rights by all.²

3.4 Mr Gardiner, Vice President of Liberty Victoria, agreed and discussed some of the possible consequences of inequality for same-sex attracted people, including fostering a climate of homophobia and inviting all the negative personal and societal consequences of inequality:

Of course, as has already been mentioned, the Australian parliament, the current government, introduced a huge raft of excellent moves towards equality in 2008, amending some 84 or 85 federal laws to introduce equal

1 Of the very large number of submitters who expressed this view, some included Amnesty International, *submission m15*, p. 1; Human Rights Law Resource Centre, *submission m33*, p. 2; NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3; Victorian Women Lawyers, *submission m52*, p. 1; Law Council of Australia, *submission m53*, p. 1; NSW Council for Civil Liberties, *submission m67*, p. 1; Australian Human Rights Commission, *submission m89*, p. 1.

2 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 3.

treatment for same-sex couples, leaving only one glaring hole in the edifice of equality. That has real consequences. As our submission points out...the ban on same-sex marriage authorises discrimination...Young same-sex attracted people...are harmed by the environment that authorises discrimination. There are pressures on young gay people growing up in a society which is not merely largely heterosexual but heterosexist, which says, 'If you are not heterosexual then you are unworthy.' That is difficult. The existing marriage law, with its insistence on inequality, creates an environment, as we say in our submission, which authorises discrimination and which harms young people...Those young people are pushed in the direction of depression and, indeed, suicide, by the environment which is created by things like this marriage law.³

3.5 Dr Adiva Sifris, also representing the Castan Centre, agreed that marriage imbues a sense of legitimacy, and reduces discrimination against same-sex couples.⁴ Citing the raft of legislation passed by the Commonwealth in 2008 which eliminated discrimination against same-sex couples, Dr Sifris applauded the measures already undertaken by the Government but invited further action:

You can already see the flow-on effects of [the 2008 measures]. A recent Galaxy poll showed that the number of same-sex marriages had increased by three per cent from two years ago. As the law changes, it starts to pull society along with it.⁵

Marriage and family as dynamic institutions

3.6 Proponents of the Bill argue that marriage is an institution which has evolved markedly over time.⁶ The Law Council of Australia observed that:

Legal reform of this nature is not unique, it is the natural progression of rights development as it accords with changes in social practice.⁷

3.7 The Australian Coalition for Equality submitted that:

The institute[ion] of marriage has changed over [the] 200 year history of Australia. No longer is marriage allowed between men and a 12 year old girl. Consenting adults may now choose who their partner for life is, rather than being forced into an "arranged marriage". Women are no longer denied legal rights nor treated as property during a marriage transaction of business. Couples of mixed-race may now be married and recognised by the law. Marriages between people of Aboriginal heritage are no longer restricted as they were previously. People from differing religious backgrounds are no longer frowned upon by society if they enter into a

3 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

4 See also, for example, AIDS Council of NSW, *submission m4*, pp 2–3.

5 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 4.

6 See, for example, Victorian Women Lawyers, *submission m52*, p. 4; Australian Marriage Equality, *submission m90*, p. 33.

7 Law Council of Australia, *submission m53*, p. 8.

commitment for life. Society in Australia now recognises and accepts divorce.⁸

3.8 In its supplementary submission to the inquiry, Australian Marriage Equality submitted that:

In the past, defenders of absolute monarchy, established religion and the second-class status of women, sought to place these forms of oppression beyond change by claiming some divine, natural or historical mandate for them. However, in each case the progress of history revealed these institutions to be purely social arrangements. Discrimination in marriage is no different. The future will show that this discrimination is mandated neither by nature nor by history and that its removal is both inevitable and desirable.⁹

3.9 One example of that evolution, cited several times through the course of the committee's hearing, was the abolition of the prohibition on interracial marriage in the United States in 1967.¹⁰ Marriage between the races had been outlawed in some states until that time, a practice now widely accepted as a violation of fundamental human rights. Mr Rodney Croome, representing Australian Marriage Equality (AME), observed that:

Marriage, like every social institution, changes to keep pace with changing social attitudes, and it is clear from the evidence we have heard this morning that a majority of Australians believe marriage today can encompass same-sex relationships. As I said earlier, Australian public policy is heading in the same direction with the recognition of same-sex de facto marriages. Marriage can and should change to reflect what we understand committed, loving relationships to be. If it does not, it becomes irrelevant and fossilised. In my mind, what degrades and demeans marriage is the fact that we keep it petrified at a certain time rather than allowing it to change.¹¹

3.10 Reverend Nathan Nettleton was one of the significant number of witnesses who discussed the relationship between marriage and the raising of children, and its implications for the validity of same-sex marriages. Reverend Nettleton, a Baptist Pastor appearing in his private capacity, put his view this way:

I would support the view that many marriages involve procreation, but I am yet to hear from the groups who argue that that we should outlaw postmenopausal marriage. It seems to me to be inconsistent. There are many marriages that we know where there is no possibility of children and we still support those marriages...My view is that procreation is a part of

8 Australian Coalition for Equality, *submission m88*, p. 3.

9 Australian Marriage Equality, *supplementary submission*, p. 5.

10 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

11 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 20.

some marriages, but is not one of the conditions that define a marriage as a marriage.¹²

3.11 Australian Marriage Equality agreed, submitting that:

There is no intrinsic association between marriage and the raising of children. There is no evidence that children fair worse when raised by two parents of the same-sex. Indeed, the children raised by same-sex partners benefit from marriage equality. Therefore, there is no basis upon which to assert that children will be harmed by same-sex marriage.¹³

3.12 Reverend Dorothy McRae-McMahon also appeared in a private capacity, but expressed her view on the relationship between marriage and children from a religious perspective as follows:

I suspect that, from church to church, very often the procreation issue is raised, and all of us have responded to that one, in that, although that is of course part of some marriages, it cannot be part of all marriages, even heterosexual marriages. So it cannot be sustained, I do not think.¹⁴

3.13 The committee heard that the constitution of families, too, has changed over time. Dr Sifris submitted that:

The first thing is that the family is and was regarded as the foundation of society. Historically the family was based on marriage, and it was for this reason that the state has furiously protected the institution of marriage. But we need to understand that, in 2009, families are not what they were even 20 or 30 years ago. Families come in diverse forms. I have some statistics here from the Australian Bureau of Statistics which basically set out the different kinds of family forms. One can see that one-parent families and couple families without children are on the increase, whereas couples with children are on the decrease. On the other hand, de facto couples—people who do not marry—have increased from less than six per cent of all couples in 1986 to nearly 15 per cent now. Our whole concept of family in 2009 is very different to what it was 20 years ago.¹⁵

3.14 Even if the presence of children is accepted as important in the definition of marriage, the committee notes evidence cited by Australian Marriage Equality that increasing numbers of same-sex couples are choosing to raise children. Research from Professor Jenni Millbank in 2002 found that:

Surveys of gay men in the USA have suggested that around 10% of gay men are parents. American and Australian surveys of lesbians and NZ census data suggest that between 15-20% of lesbians have children. Australian surveys suggest that this proportion is likely to increase in the

12 Rev. Nettleton, *committee hansard*, 9 November 2009, p. 55.

13 Australian Marriage Equality, *submission m90*, p. 40.

14 Rev. McRae-McMahon, *committee hansard*, 9 November 2009, p. 58.

15 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 3

next 5 years as many lesbians also indicate that they are planning to have children in the future.¹⁶

Commitment

3.15 A number of opponents of the Bill referred to same-sex relationships not enjoying the same levels of monogamy as heterosexual marriages.¹⁷ It was argued that there is considerable difficulty in judging the comparative levels of commitment between heterosexual and same-sex relationships, primarily because the latter are unable to marry, putting their relationships in a different legal and societal category from married heterosexuals. This, in addition to the residual homophobia experienced by many gays and lesbians, renders a direct comparison of levels of commitment, often expressed by reference to the average length of relationships, inaccurate and unfair.

3.16 Mrs Shelley Argent, representing the Parents and Friends of Lesbians and Gays (PFLAG), was one witness who disputed the view that comparison between heterosexual and same-sex unions was fair or helpful. Mrs Argent observed that same-sex relationships:

... are often coming from a situation where they are already living under pressure. A lot of them do not have family support and their partners are not welcome in the family home, so of course that is going to put pressure on the relationship. If you have to go home alone and you cannot take your partner with you at Christmas time, of course that puts pressure on the relationship. Then you also have this societal expectation, even from some parents, that the relationship will not work because it is a same-sex one. I just think that is insulting...It is all about respecting them as individuals and respecting their relationship.¹⁸

3.17 Notwithstanding the difficulties in gauging relative levels of commitment, Ms Dane spoke to research from jurisdictions which allowed same-sex marriage which suggested that marriage enhanced the level of commitment felt by same-sex couples. Ms Dane reported that:

Not surprisingly, studies involving countries and US states that have extended the marriage right show marriage benefits same-sex couples in much the same way as it has been shown to benefit opposite-sex couples. For example, a recent study by Badgett et al involving 552 married same-sex couples in Massachusetts found that close to 75 per cent felt that marriage had increased their commitment to their spouses. Seventy-five per cent felt more accepted by their community as a result, including by their

16 Australian Marriage Equality, *submission m90*, p. 36, citing Millbank J., *Meet the Parents*, 2002, http://grrl.org.au/images/stories/meet_the_parents.pdf.

17 See, for example, Mr Robert Ward, *committee hansard*, 9 November 2009, p. 62; Dr David Phillips, *committee hansard*, 9 November 2009, p. 34.

18 Mrs Shelley Argent, *committee hansard*, 9 November 2009, p. 37.

siblings and parents. Of those living with children, over 90 per cent felt that their children were happier and better off as a result of their marriage.¹⁹

3.18 Rev. Nettleton submitted that the argument made by opponents of same-sex marriage about levels of commitment disclosed an element of internal inconsistency:

To criticise the homosexual community, as many do, for its alleged promiscuity while at the same time working to deny them access to the social structures that encourage and support fidelity for the rest of us is surely disingenuous.²⁰

Same-sex couples' desire for marriage

3.19 Opponents of the Bill argued that the call for marriage among same-sex attracted people is coming from only a vocal minority within the gay community.²¹ In response, Ms Dane observed that:

If 10 per cent or 20 per cent of same-sex couples wanted to be married, that should be enough because it is about having the choice. The same would apply if, all of a sudden in time to come, only 30 per cent or 40 per cent of heterosexual couples chose to marry. Would that be a reason to abolish marriage? People still need a choice. So I have not really gone down the path of the numbers for that argument; I have only stated this to try and dispel the myth out there that I frequently hear that same-sex couples are promiscuous and do not really want to marry, and that is not true.²²

3.20 Dr Sifris agreed with Ms Dane:

A recent study shows that a lot of same-sex couples want that option to marry. Once again it comes back to options and choices. If heterosexual couples have the option to marry, the option to register, the option to do nothing, same-sex couple should have that same choice. It is a question of discrimination. Options and choices.²³

3.21 The committee notes evidence from the NSW Gay and Lesbian Rights Lobby of a 2006 survey conducted among gay and lesbian people living in NSW which found 86.3 per cent of respondents were in favour of gay marriage.²⁴ A similar survey conducted by the Victorian Gay and Lesbian Rights Lobby in 2005 found that 79.8 per cent of lesbian, gay, bisexual, transgendered and intersex people surveyed wanted same-sex marriage to be available.²⁵

19 Ms Sharon Dane, *committee hansard*, 9 November 2009, p. 22. This study was discussed in more detail in Australian Marriage Equality's submission (m90) at p. 26.

20 Rev. Nathan Nettleton, *committee hansard*, 9 November 2009, p. 52.

21 See, for example, Mr Chris Meney, *committee hansard*, 9 November 2009, p. 45; Mr Robert Ward, *committee hansard*, 9 November 2009, pp 62–63.

22 Ms Sharon Dane, *committee hansard*, 9 November 2009, p. 27.

23 Dr Adiva Sifris, *committee hansard*, 9 November 2009, p. 9.

24 NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3.

25 Australian Marriage Equality, *submission m90*, p. 46.

3.22 A 2009 Galaxy poll was also brought to the attention of the committee, which found that 60 per cent of Australians supported giving same-sex couples the right to marry.²⁶

3.23 Many same-sex couples submitted their personal views about marriage, emphasising that they saw themselves as being the same as any other couple intending to marry, including their desire for formal recognition of those relationships in front of their friends and family. For example, the Hon. Ian Hunter MLC submitted that:

I want to get married. I know that I could travel overseas and do it, but like most people, I want to celebrate my love and my life surrounded by my friends and family.²⁷

3.24 Mr Michael Burge was in a similar position, submitting that:

While our marriage ceremony was very special to us, it was very difficult to involve our wider circle of friends and family, since the closest geographical place for us to marry was an international flight away. The cost of travelling to New Zealand was prohibitive to most people, and we did not expect anyone to spend a lot of money to be at our wedding.²⁸

3.25 Family members of same-sex couples also took the view that same-sex couples were no different to those of opposite sex. These views are well highlighted by Ms Annette Naylor, who submitted that:

...Both of my daughters are in relationships and are engaged to their respective partners. As a mother, I am very fortunate that they have each found such wonderful partners, who love and respect them...I have always loved and treated both of my daughters equally. They have both grown into beautiful, strong and intelligent women, whom I am extremely proud of. However, the eyes of the law currently do not see one of my daughters as equal. Despite the fact that I attended each of my daughter's engagements last year, one of my daughters cannot get married. The reason why my eldest daughter cannot get married is because she is gay and in a same-sex relationship. She is no different and no less of a person than my youngest daughter. Her sexuality does not define who she is and when I look at her, I do not see "my gay daughter"... I see my daughter. Her relationship is no less loving, no less committed and no less equal to her sister's relationship. How will allowing my eldest daughter to marry undermine my youngest daughters' marriage? As a mother, I want to attend both of my daughter's weddings. I want to be there for both of my girls during one of the most significant moments in their lives. I want them both to be treated as equals in the eyes of the law, just as they should be...²⁹

26 NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 3.

27 Hon Ian Hunter, *submission ef2*, p. 1.

28 Mr Michael Burge, *submission if52*, p. 1.

29 Ms Annette Naylor, *submission ef23*, p. 1.

Broader role and benefits of marriage

3.26 Proponents of the Bill spoke of their desire to make available the benefits of marriage to themselves and their loved ones, and argued that the benefits extended further than the couple themselves.³⁰ Mrs Argent submitted that:

A marriage ceremony puts the same-sex relationship into a context everyone is familiar with and has the potential to transform what the couple means to each other in the eyes of the family, friends and society in general. For many parents it will also take the sting out of their son or daughter identifying as lesbian or gay, because one of the main concerns parents experience is the loss of the tradition of having the marriage option for their child. For many this is a huge source of disappointment. For others it can also help the family come out and come to terms with their sexual orientation in a positive setting. Supporting friends and family bearing witness to the ceremony certainly helps to strengthen the couple's bond and show the relationship as meaningful in society.³¹

3.27 Mr Croome added that:

[M]arriage is an institution through which partners find connection and belonging not only with each other but within their families and within their communities. That is why marriage traditionally and conventionally creates kinship. We have terms like brother-in-law and mother-in-law. It is why conventionally at wedding ceremonies those present are asked if they assent to the marriage. It is not simply about the partners, as important as their bond is. It is about a public recognition of that and the creation, like I said, of connection and belonging. Marriage provides us with a universal language of love and commitment.³²

3.28 Mr Tuazon-McCheyne agreed, and spoke from his experience as a marriage celebrant:

I...have married over 1,000 Australian couples. They all receive a blessing from their community and their family and friends when they have their wedding ceremony. The most important thing about a wedding day, and the reason I do it, is that the 80 to 150 people who are there are the key people in their lives. They want to give love and energy to that couple and give them a boost on their journey and they want to celebrate what they have. We do not get that many great days in our lives, and the wedding day, the marriage day, is one of those days. That is one of the reasons why people get married, and that is one of the reasons why we got married.³³

30 A very large number of submitters made a similar point, including for example, the AIDS Council of NSW, *submission m4*, p. 1; Victorian Women Lawyers, *submission m52*, p. 4; Australian Marriage Equality, *submission m90*, pp 25–27.

31 Mrs Shelley Argent, *committee hansard*, 9 November 2009, p. 32.

32 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 20.

33 Mr Jason Tuazon-McCheyne, *committee hansard*, 9 November 2009, pp 22–23.

3.29 In addition to the benefits felt by the couple, their family and friends, the committee heard that marriage as an institution stood to gain from same-sex marriage. Australian Marriage Equality submitted evidence that marriage equality may solidify the institution of marriage based on an examination of places where the formal recognition of same-sex relationships has a relatively long history. Citing Denmark, Norway and Sweden marriage rates have increased by as much as 30% and divorces are steadily decreasing in number, drawing Australian Marriage Equality to conclude that the example of formally-recognised same-sex partners seems to have helped inspire an increasing number of young heterosexual couples to marry. Australian Marriage Equality also cited the Wall Street Journal in an October 2006 opinion article on same-sex marriage, in which its assessment of the Scandinavian experience was that: 'there is no evidence that allowing same-sex couples to marry weakens the institution. If anything, the numbers indicate the opposite'.³⁴

3.30 In seeking to contrast the benefits of marriage over those associated with civil unions, Mr Croome concluded that:

The repeated complaints of partners is that their status as civil union partners is not recognised or understood by key agencies—health insurers, schools or even government agencies—and certainly not in social discourse by their families, friends and neighbours. So while civil unions might grant those partners equal entitlements as married partners in practice they are often denied those entitlements by authorities who are ignorant of what a civil union is or who are deliberately discriminatory... but many of the partners I have spoken to say that, even though they are guaranteed by that registry the same spousal rights as married couples in Tasmanian law, often that is not respected by state authorities, by health insurers, by schools or whomever it might be simply because there is not an understanding of what that means.³⁵

Human rights and responsibilities

3.31 One of the key arguments for legalising same-sex marriage was its protection under Australia's international human rights obligations. Australia is a party to numerous human rights treaties, one of which is the International Covenant on Civil and Political Rights (ICCPR). Whilst the ICCPR does not contain an express right for same-sex marriage, it does have a prohibition on discrimination. Article 26 expressly prohibits discrimination, which is any distinction, exclusion, restriction or preference on any ground which has the purpose or effect of nullifying or impairing the enjoyment or respect of human rights by all on an equal footing. Dr Gerber submitted that the Toonen case stands for the principle that discrimination includes discrimination on the grounds of sexual orientation, meaning that discrimination

34 Australian Marriage Equality, *submission m90*, p. 28, quoting Spedale and Eskridge Jr, *Wall Street Journal*, October 27 2006.

35 Mr Rodney Croome, *committee hansard*, 9 November 2009, p. 27.

through excluding people from the right to marry solely based on sexual orientation is a breach of article 26 of the ICCPR.³⁶

3.32 The Australian Human Rights Commission took the same view of international law, submitting that:

Equality is a fundamental principle of international law. The Commission believes that a human rights analysis based on the principle of equality supports the recognition of same sex marriage.³⁷

3.33 Dr Gerber went on to argue that, in respect of couples with children, Australia's international obligations compel the recognition of a relationship between a child's parents on the basis that to do so is in the child's best interests:

Same-sex couples are now having children. International human rights law recognises that the family is the fundamental group unit of society and deserves special support and protection. Article 2 of the Convention of the Rights of the Child protects children from discrimination on the grounds of their parents' status, and that status includes their sexual orientation. The UN Committee on the Rights of the Child has expressly stated that it is concerned that discrimination based on the sexual orientation of the parents impacts negatively on the children. The Convention on the Rights of the Child also requires that any decision that impacts or affects children must be made with the best interests of the child being a primary consideration. Prohibiting a child's parents from marrying is not in the best interests of the child. All children deserve the chance to grow up in a stable and loving home with parents in a relationship that is publicly recognised and respected. There is extensive empirical research...that says that children raised in same-sex families are not disadvantaged by the fact that their parents are of the same sex, but what will disadvantage them is when those parents are discriminated against purely on the basis of their sexual orientation.³⁸

Recognition of marriages conducted overseas

3.34 A related, though separate issue is the question of whether to recognise same-sex marriages validly solemnised overseas. Such marriages are not currently recognised by Australia, but the Bill would reverse this. Among those in support of the Bill, the proposal received strong support.³⁹ The Law Institute of Victoria

36 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 2. Other submitters making this or a similar point included the Australian Human Rights Commission, *submission m89*, pp 4–5; Amnesty International, *submission m15*, p. 3; Public Interest Advocacy Centre, *submission m24*, p. 3; Human Rights Law Resource Centre, *submission m33*, pp 4–5; Law Institute of Victoria, *submission m34*, pp 1–2; NSW Gay and Lesbian Rights Lobby, *submission m45*, p. 4.

37 Australian Human Rights Commission, *submission m89*, p. 3.

38 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 2.

39 See, for example, the Sydney Gay and Lesbian Choir, *submission m31*, p. 1; Human Rights Law Resource Centre, *submission m33*, p. 11; Law Institute of Victoria, *submission m34*, p. 2; Law Council of Australia, *submission m53*, p. 7; Australian Human Rights Commission, *submission m89*, p. 3.

submitted that Australia was obliged under the Hague Convention to recognise same-sex marriages, on the basis that the Convention's purpose is to 'facilitate the celebration of marriages and the recognition of the validity of marriages' between Contracting States, and that it was generally accepted that a marriage 'validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States'.⁴⁰

3.35 While the Institute conceded that the Hague Convention does not define marriage, it informed the committee that marriage should be interpreted in its broadest, internationalist sense, as required by Article 5 which provides that the 'application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the State of celebration'. The LIV concluded that, given 'public opinion in Australia is in favour of recognising same sex marriages...in the LIV's view, [there is] no international legal basis upon which Australia can justify its non recognition of foreign same sex unions'.⁴¹

3.36 Mr Gardiner argued that Australia was under an obligation to recognise such unions, and that:

...[T]he Hague convention should be obeyed, not violated. There are couples from Canada, from the United States, from South Africa, from Belgium, from the Netherlands, from Sweden and Norway, and soon from Albania and others...who are validly married under their laws and who have a right under the Hague convention to expect that we will acknowledge their marriage if they come here, and that should be done, too. Repealing section 88EA of the Marriage Act is quite independent of the question of whether people can get married here.⁴²

3.37 Dr Gerber concurred that Australia was in breach of its obligations, adding:

We are clearly in breach of that treaty. We even recognise legally performed polygamist marriages from Saudi Arabia and other such countries out of respect for our international obligations under the Hague convention. Professor Hilary Charlesworth referred to Australia as being 'Janus faced'. We present one face to the international community as an upholder and respecter of international human rights law by ratifying all these treaties and saying we are a worthy, human rights respecting country, and we are seeking a seat on the UN Security Council. But domestically it is the opposite in many cases, with children in immigration detention centres and our treatment of Indigenous Australians, and you can now add to that our treatment of sexual minorities. Internationally we are saying: 'We are going to uphold these laws. They are good, just laws; we agree with them,' but domestically we are ignoring them.⁴³

40 Law Institute of Victoria, *submission m34*, p. 2.

41 Law Institute of Victoria, *submission m34*, p. 2.

42 Mr Jamie Gardiner, *committee hansard*, 9 November 2009, p. 5.

43 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 6.

3.38 Dr Gerber also pre-empted any argument that recognition of marriages conducted overseas would provide a loophole through which Australian same-sex couples could be married offshore and be recognised at home, pointing out that many countries require at least one party to a marriage to be a resident of that country before the marriage can take place.⁴⁴

3.39 The adverse affects of allowing same-sex marriages offshore, yet failing to recognise them within Australia, were set out by a number of witnesses, of which Australian Marriage Equality was one:

First, for most of these couples, travelling overseas to marry is not their preference. They would marry in Australia if it were allowed because a) they would be closer to family and friends, b) a marriage at home is cheaper and much easier to arrange, and c) they would not risk the legal and financial complications associated with marriage and/or divorce in other jurisdictions (for example, non-residents can marry in Canada but only residents can divorce, and unlike Australia, divorce in Canada is fault-based)...Secondly, after going to so much trouble to marry overseas, couples have no legal recognition of their legal status or solemn vows when they return to Australia. This is deeply offensive to these couples...⁴⁵

3.40 Australian Marriage Equality also points to the distress felt by foreigners moving to Australia from jurisdictions in which they have lived as part of a married couple in the eyes of society and the law, but whose marriages are not recognised under Australian law.⁴⁶

Certificate of non-impediment

3.41 In addition to Australia declining to recognise same-sex marriages conducted overseas, the committee's attention was drawn to an apparent policy of the Government to decline to issue a certificate of non-impediment to same-sex couples who wish to marry overseas. These certificates are usually required by foreign governments before a marriage can be solemnised. Australian Marriage Equality submitted that:

Since the end of 2005 we have received a steady stream of complaints from Australians seeking to marry their same-sex partners overseas for whom the Government's refusal to provide a CNI has caused immense frustration...We understand that the Dutch Government has responded by waiving the CNI requirement for Australians entering same-sex marriages. We have been told the only other nationality it does this for is Zimbabweans...our understanding is that CNIs are issued to establish that there is no impediment to an Australian marrying overseas, not to establish there is no impediment to the recognition in Australia of the marriage they intend entering. This is confirmed by the documentation publicly available. For example, the application form for an Australian CNI asks the applicant

44 Dr Paula Gerber, *committee hansard*, 9 November 2009, p. 8.

45 Australian Marriage Equality, *submission m90*, p. 24.

46 Australian Marriage Equality, *submission m90*, p. 24.

to confirm they are not already married to another person in Australia. It does not ask if they seek to enter a same-sex marriage... Our understanding of the role of CNIs is also supported by the international experience. Other governments request CNIs from Australia to ascertain whether there are impediments to them solemnising marriages involving Australian citizens. Chief amongst such impediments are whether the Australian citizens in question are already married in Australia and are of marriageable age. Foreign governments are aware of the discriminatory nature of Australian law, and are not seeking further information about such discrimination because it is not relevant to them.⁴⁷

47 Australian Marriage Equality, *submission m90*, p. 51.

