The Senate

Legal and Constitutional Affairs Legislation Committee

Marriage Equality Amendment Bill 2010

June 2012

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Recommendation 3

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

Recommendation 4

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

CHAPTER 1

Introduction

Referral of the inquiry

1.1 The Marriage Equality Amendment Bill 2010 is a private senator's bill that was introduced into the Senate by Senator Sarah Hanson-Young from the Australian Greens on 29 September 2010.[1]

1.2 On 8 February 2012, the Senate referred the Marriage Equality Amendment Bill 2010 (Senator Hanson-Young's Bill) to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 25 May 2012.[2] The reporting date was subsequently extended to 6 June 2012.[3] On 31 May 2012, the committee advised the Senate in an interim report that it intended to present its final report by 25 June 2012.[4]

Purpose of the bill

1.3 Senator Hanson-Young's Bill would amend the current definition of marriage in the *Marriage Act 1961* (Cth) (Marriage Act) – 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'[5] – to 'the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life'.[6]

1.4 In her second reading speech, Senator Hanson-Young stated that the purpose of the bill is 'to provide equality for same-sex couples...[by removing] discrimination under the Marriage Act so that while marriage is still a union between two consenting adults, it is not defined by gender'.[7]

1.5 Section 3 of Senator Hanson-Young's Bill reflects this intention, setting out the objects of the bill:

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1 Journals of the Senate, No. 2 – 29 September 2010, p. 100.

2 Journals of the Senate, No. 74 – 8 February 2012, p. 2053.

3 Journals of the Senate, No. 77 – 28 February 2012, p. 2138.

4 Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Marriage Equality Amendment Bill 2010*, May 2012.

5 Subsection 5(1) of the *Marriage Act 1961* (Marriage Act).

6 Item 1 of Schedule 1 of the Marriage Equality Amendment Bill 2010 (Senator Hanson-Young's Bill).

7 *Senate Hansard*, 29 September 2010, p. 307.

- to remove from the Marriage Act discrimination against people on the basis of their sex, sexual orientation or gender identity; and
- to recognise that freedom of sexual orientation and gender identity are fundamental human rights; and
- to promote acceptance and the celebration of diversity.

Provisions of the bill

1.6 The key provision in Senator Hanson-Young's Bill is item 1 of Schedule 1, which repeals the current definition of marriage in the Marriage Act and substitutes the new definition.

1.7 Item 5 of Schedule 1 of Senator Hanson-Young's Bill repeals section 88EA of the Marriage Act. Section 88EA provides that certain unions are not marriages: specifically, a union solemnised in a foreign country between a man and another man, or a woman and another woman, must not be recognised as a marriage in Australia.

1.8 Consequential amendments in items 2, 3, 4 and 6 of Schedule 1 change references in the Marriage Act to reflect the amended definition of marriage in item 1 of Schedule 1. For example, subsection 46(1) of the Marriage Act requires that, before a marriage is solemnised by, or in the presence of, an authorised celebrant (not being a minister of religion of a recognised denomination), the celebrant shall say a specific form of words to the parties getting married to explain the nature of marriage. The specific form of words the celebrant is required to say under subsection 46(1) includes the statement that marriage is a union of 'a man and a woman'. Item 3 of Schedule 1 amends the words that the celebrant is required to say to the parties, replacing 'a man and a woman' with the words 'two people'.

Other marriage equality bills before parliament

1.9 There are currently two other bills before the parliament containing proposed amendments to the Marriage Act that would allow for marriage equality for same-sex couples: the Marriage Amendment Bill 2012, introduced into the House of Representatives by Mr Adam Bandt MP and Mr Andrew Wilkie MP (Bandt/Wilkie Bill); and the Marriage Equality Amendment Bill 2012, introduced into the House of Representatives by Mr Stephen Jones MP (Jones Bill).

1.10 While all three bills before the parliament have the purpose of amending the Marriage Act to provide for marriage equality, there are some key differences between the bills.

1.11 The definition of marriage in the Jones Bill is 'the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life'.[8]

8 Item 1 of Schedule 1 of the Marriage Amendment Bill 2012 (Jones Bill).

The definition of marriage in the Bandt/Wilkie Bill is identical to the definition in Senator Hanson-Young's Bill.[9]

1.12 Part IV of the Marriage Act deals with the solemnisation of marriages in Australia. Section 47 of the Marriage Act provides that nothing in Part IV imposes an obligation on authorised celebrants who are ministers of religion to solemnise *any* marriage.[10] The Jones Bill amends section 47 to insert a subparagraph which explicitly provides that authorised celebrants who are ministers of religion are not obliged to solemnise a marriage where the parties to the marriage are of the same sex.[11]

1.13 The Bandt/Wilkie Bill amends section 47 to clarify that nothing in the Marriage Act, or any other law, imposes an obligation on a minister of religion to solemnise any marriage.[12] Further, the Bandt/Wilkie Bill contains an application clause which clarifies that, for the avoidance of doubt, the bill does not limit the effect of section 47 of the Marriage Act (but this clause does not actually amend section 47 itself).[13] Senator Hanson-Young's Bill does not amend section 47 of the Marriage Act in any way.

1.14 A table comparing all the amendments proposed in each of the three bills is set out in Appendix 1 to this report.

1.15 The Bandt/Wilkie Bill and the Jones Bill were jointly referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report. That committee tabled its report on 18 June 2012.[14]

Previous Senate committee inquiries on marriage bills

1.16 In recent years, the committee has conducted two inquiries into legislation which has proposed changes to the definition of 'marriage' in the Marriage Act.

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9 Item 1 of Schedule 1 of the Marriage Equality Amendment Bill 2012 (Bandt/Wilkie Bill).

10 See subparagraph 47(a) of the Marriage Act (emphasis added).

11 Item 3 of Schedule 1 of the Jones Bill.

12 Item 4 of Schedule 1 of the Bandt/Wilkie Bill.

13 Item 8 of Schedule 1 of the Bandt/Wilkie Bill. The committee also notes the motion moved by Mr Wilkie, agreed to by the House of Representatives on 31 May 2012, that, should the Marriage Act be amended to allow for the marriage of same-sex couples, any such amendment should ensure that there is no obligation imposed on any church or religious minister to perform such a marriage: House of Representatives, Votes and Proceedings, No. 112—31 May 2012, p. 1545.

14 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory report: Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, June 2012. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill marriage/report.htm (accessed 18 June 2012).

Inquiry into the Marriage Legislation Amendment Bill 2004[15]

1.17 On 23 June 2004, the Senate referred the Marriage Legislation Amendment Bill 2004 (First 2004 Bill) – a bill introduced into the House of Representatives on 27 May 2004 by the then Attorney-General, the Hon Philip Ruddock MP – to the committee for inquiry and report on 7 October 2004.[16] Schedule 1 of the First 2004 Bill proposed to amend the Marriage Act to:

- define marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life; and
- confirm that unions solemnised overseas between same-sex couples will not be recognised as marriages in Australia.

1.18 Schedule 2 of the First 2004 Bill proposed amendments to the *Family Law Act 1975* to prevent inter-country adoptions by same-sex couples under multilateral or bilateral agreements or arrangements.

1.19 The Explanatory Memorandum to the First 2004 Bill stated that the purpose of that bill was:

> [T]o give effect to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage.[17]

1.20 On 24 June 2004, the Marriage Amendment Bill 2004 (Second 2004 Bill), was introduced by Mr Ruddock into the House of Representatives.[18] The Second 2004 Bill contained Schedule 1 of the First 2004 Bill (relating to the amendment of the Marriage Act). The Explanatory Memorandum to the Second 2004 Bill reiterated the purpose of that bill as seeking to ensure that same-sex relationships were not to be equated with marriage.[19]

1.21 The Second 2004 Bill was passed by the House of Representatives on the same day it was introduced, was passed by the Senate on 13 August 2004, and received Royal Assent on 16 August 2004.

1.22 The committee received over 16,000 submissions for its inquiry into the First 2004 Bill. Most submissions related to Schedule 1 of the First 2004 Bill (the marriage aspect). However, as the committee noted:

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15 See Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004,* 6 September 2004.

16 Journals of the Senate, No. 153 – 23 June 2004, p. 3653.

17 Explanatory Memorandum to the Marriage Legislation Amendment Bill 2004, p. 2.

18 House of Representatives, Votes and Proceedings, No. 184 – 24 June 2004, p. 1742.

19 Explanatory Memorandum to the Marriage Amendment Bill 2004, p. 1.

> The effect of the Senate passing the Second [2004] Bill was that the Senate indicated that it no longer required the committee's advice on that part of the [First 2004] Bill. In the absence of any further direction from the Senate, the Committee was only obliged to report on the remaining part of the [First 2004] Bill, that is, the schedule in relation to adoption by same-sex couples.[20]

1.23 On 31 August 2004, the Governor-General prorogued the 40th Parliament and dissolved the House of Representatives. Accordingly, the committee resolved not to continue its inquiry into Schedule 2 of the First 2004 Bill.[21]

Inquiry into the Marriage Equality Amendment Bill 2009[22]

1.24 On 24 June 2009, Senator Hanson-Young introduced the Marriage Equality Amendment Bill 2009 (2009 Bill) into the Senate. The 2009 Bill is identical to the current version of the bill, apart from some key differences to the definition of 'marriage'.[23] On 25 June 2009, the Senate referred the Marriage Equality Amendment Bill 2009 to the committee for inquiry and report by 26 November 2009.[24] The committee received in excess of 28,000 submissions for the 2009 inquiry: approximately 11,000 in favour of the bill; and 17,000 opposed to it.[25]

1.25 In its report, the committee recommended that the 2009 Bill should not be passed (Recommendation 3). The committee also recommended:

- that the government review (by reference to the Australian Law Reform Commission, or some other appropriate mechanism) relationship recognition arrangements with the aim of developing a nationally consistent framework to provide official recognition for same-sex couples and equal rights under federal and state laws (Recommendation 1);[26] and

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20 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004*, 6 September 2004, p. 1.

21 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Marriage Legislation Amendment Bill 2004*, 6 September 2004, p. 2.

22 See Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009.

23 The Marriage Equality Amendment Bill 2009 (2009 Bill) used the term 'sexuality', which has been replaced by 'sexual orientation' in the current Bill. The definition of marriage in the 2009 Bill did not include the phrase 'to the exclusion of all others'.

24 Journals of the Senate, No. 77—25 June 2009, p. 2206.

25 See Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, pp 1-2.

26 The committee noted that such a reform should 'synthesise and harmonise' law reforms made in 2008 to remove discrimination against same-sex couples: see Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, p. 39. The 2008 same-sex law reforms are discussed below in paragraphs 1.28 and 1.29.

- that the Department of Foreign Affairs and Trade issue Certificates of Non-Impediment to couples of the same sex on the same basis as they are issued for couples of different sexes (Recommendation 2).[27]

1.26 In February 2010, the Senate voted on the 2009 Bill, and it was defeated.[28]

1.27 The committee notes that the Australian Government has implemented Recommendation 2 of the committee's report, which will enable same-sex couples to take part in a marriage ceremony overseas and to be recognised as being married according to the laws of that country.[29]

Same-sex law reforms

1.28 In 2008, the Australian Government amended 85 Commonwealth laws, to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veterans' affairs, workers' compensation, educational assistance, superannuation, family law and child support. The aim of the reforms was to ensure that same-sex couples and their families are recognised and have the same entitlements as opposite-sex de facto couples.[30]

1.29 These reforms did not include amending the Marriage Act.

Conduct of the current inquiry

1.30 The committee advertised the current inquiry in *The Australian* on 15 and 29 February, and 14 March 2012. Details of the inquiry, including links to the bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also specifically invited a number of organisations and individuals to make submissions. The closing date for submissions was 2 April 2012.

1.31 The committee held public hearings in Sydney on 3 May 2012, and in Melbourne on 4 May 2012. A list of witnesses who appeared at the hearings is at

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27 Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, November 2009, p. vii.

28 Journals of the Senate, No. 112 – 25 February 2010, p. 3228. The 2009 Bill was defeated by a vote of 45-5.

29 See the Hon Nicola Roxon MP, Attorney-General, *Certificates of No Impediment to marriage for same-sex couples*, Media release, 27 January 2012, available at http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/27-January-2012---Certificates-of-No-Impediment-to-marriage-for-same-sex-couples.aspx (accessed 14 May 2012).

30 See, Attorney-General's Department, *Same-Sex Reforms*, available at: http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx (accessed 16 May 2012).

Appendix 3, and copies of the *Hansard* transcripts are available through the committee's website.

Numbers, categorisation and publication of submissions

1.32 The committee received approximately 75,100 submissions by midnight on 2 April 2012 (the closing date for submissions): of these 43,800 supported the bill and 31,300 opposed it.[31] Between 3 April 2012 and 25 June 2012 (the reporting date for the inquiry), the committee received an additional 4,100 submissions, of which 2,600 supported the bill and 1,500 opposed it. This amounts to 79,200 submissions in total: 46,400, or approximately 59 per cent, supporting Senator Hanson-Young's Bill; and 32,800, or approximately 41 per cent, opposing it. This is a record number of submissions for a Senate committee inquiry.

1.33 Due to the unprecedented number of submissions received, along with obvious limitations on committee resources and staffing, it was not feasible to publish all submissions on the committee's website. Accordingly, the committee made the following decision: all submissions received from organisations would be published on the website, along with a selection of submissions from individuals which represented a broad range of views indicative of the types of arguments received. The committee also decided to publish an equal number of individual submissions supporting and opposing the bill.

1.34 In total, the committee published 360 submissions: 125 submissions from organisations; 116 submissions from individuals supporting the bill; 116 submissions from individuals opposing the bill; and three submissions from individuals or organisations presenting a position which neither supported nor opposed the bill. The submissions published on the committee's website are listed at Appendix 2 to this report.

1.35 For the purposes of the committee's administrative processes, the committee resolved that submissions that were not published on the website would be categorised as: form letters (or variations of form letters); or short or general statements. A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was categorised as a variation to a form letter where the template was modified in some way but could still be identified as a particular type of form letter, or where the template was supplemented with additional material, such as a personal story or other original content.

1.36 Of submissions received by midnight on 2 April, most were categorised as various types of form letters, or variations thereof: 43,000 form letters in support of the bill, and 24,200 form letters opposing it (a total of 67,200). A large number of form letters in support of the bill contained lengthy and detailed personal stories

31 All figures have been rounded to the nearest 100, with the exception of the numbers of submissions published on the committee's website.

which set out the experiences of same-sex couples (typically related by them or their friends or relatives) and explanations of what marriage equality means to them.

1.37 The remaining submissions received by midnight on 2 April (that is, those submissions that were not published on the committee's website or did not fall neatly within a form letter type) were categorised as short or general statements (600 in support of the bill, and 6,900 opposing it). Many of the submissions categorised as short or general statements in opposition to the bill were only one or two sentences in length or simple short paragraph statements of opposition to the bill.

1.38 The committee did not further categorise the submissions it received after the closing date for submissions into form letters and short or general statements, and so does not have a further breakdown of figures beyond 'for' and 'against' for those submissions received between 3 April and 25 June 2012.

Categorisation system and 'weighting' of submissions

1.39 The committee notes comments made by certain witnesses during the course of the inquiry that those submissions comprising the category of short or general statements represent 'considered' submissions,[32] as opposed to form letters. The committee wishes to clarify that such assertions are not correct. The separation of submissions into form letters and short or general statements was simply an *administrative* system of categorisation, designed to streamline some of the committee's internal document-handling processes in an inquiry in which the volume of submissions – and associated administration – created an enormous workload for committee staff.

1.40 The committee wishes to state for the record that, for the purposes of its deliberations, all submissions are treated the same and there is no 'weighting', or greater value, placed on submissions simply because of the format in which they are received. This is the case for each and every inquiry conducted by the committee and, despite the volume of submissions received for this inquiry, the committee does not believe that there is any reason that a different process should apply in this case.

1.41 The committee strongly refutes assertions that one type of submission is 'considered' or deserves a heavier weighting simply because it has been categorised for the committee's administrative purposes as something other than a form letter.

1.42 Further, the committee would like to put on the record a statement about how it conducts its inquiries. The conduct of the committee's inquiries is a matter for the committee, and only the committee, to determine in each case. In particular, the acceptance, methods of processing and publication, and deliberations on the treatment of submissions and the weighting of evidence, are all matters for the committee. Since

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32 See Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage, *Committee Hansard*, 3 May 2012, p. 25 and Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.

it is for the committee to determine how it conducts its inquiries, it is entirely inappropriate for anyone to purport to dictate to the committee the manner in which it should carry out its business.

Orchestrated submission campaigns and role of committee

1.43 The committee also wishes to correct certain claims relating to the inquiry – namely, that the inquiry was 'reduced...to the status of a cheap public poll'.[33] For the record, the establishment of this inquiry was in no way different to the establishment of any other Senate committee inquiry. In this inquiry, however, the committee's usual submission process was targeted by orchestrated email campaigns facilitated by groups on both sides of the debate. Most of these emails were generated by external websites – whereby forms could be filled out and automatically sent to the committee's email address – or were encouraged through identified campaigns which directed submitters to send submissions to the committee's email address.[34]

1.44 Despite the fact that both sides of the debate appeared to treat the committee's submission process as a 'numbers game', the committee rejects any characterisation of its inquiry as a 'cheap public poll'. The role of the committee in this inquiry, and every other inquiry, is to inquire into and report on the provisions of specific legislation, and policy issues related to that legislation. This involves detailed and comprehensive consideration, examination, and analysis of the validity and merits of all relevant evidence. The committee's role is not to record its support or opposition to legislation based on the numbers of submissions received.

Validity of submissions

1.45 The committee considers that the majority of submissions, including form letters, that it received from individuals during this inquiry were legitimate and from genuine persons. The committee decided that submissions that contained what were obviously 'false' names, or invalid email or other addresses, would not be accepted; and, as far as possible, duplicate and multiple submissions from the same individuals, as well as anonymous submissions, would be eliminated and not included in the final count.[35] Submissions would also be invalidated in cases where they could not be accessed (that is, where an electronic document could not be opened).

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33 Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.

34 See, for example, Australian Marriage Equality, Senate submission webpage, http://www.australianmarriageequality.com/senate-inquiry-submission-form/ (accessed 10 May 2012) and Australian Family Association, Submission to the same-sex marriage inquiry, http://www.family.org.au/index.php?option=com_content&view=article&id=1014:submission-to-the-inquiry-into-the-marriage-equality-amendment-bill-2010&catid=53:federal&Itemid=53 (accessed 10 May 2012).

35 Submissions were deemed to be anonymous where no identifying information whatsoever was provided, including a valid email address.

Scope of this report

1.46 The committee's report is structured in the following way: chapter 2 discusses various policy arguments in support of, and in opposition to, marriage equality in Australia; chapter 3 examines the key issues raised during the committee's inquiry in relation to specific aspects of Senator Hanson-Young's Bill and its constitutional validity; and chapter 4 sets out the committee's views and recommendations.

Note on terminology

1.47 The purpose of Senator Hanson-Young's Bill is to provide for marriage equality – that is, legislative reform that allows couples who are currently unable to marry because of their sex, sexual orientation or gender identity, to marry under the Marriage Act. The committee prefers the term 'marriage equality' to 'same-sex marriage' in this context. However, the committee has used the term 'same-sex marriage' in order to distinguish 'marriage' as it is currently defined under the Marriage Act as between a man and a woman ('traditional' marriage). The committee has also retained the term 'same-sex marriage' where it is used in submissions or by witnesses, and where the committee is referring to that evidence.

1.48 The committee also refers to 'same-sex couples' as those couples who are currently prohibited from marrying under the Marriage Act due to their sex, sexual orientation or gender identity. The committee notes, however, that in using this terminology transgender and intersex persons who may not be in a 'same-sex' relationship are also affected by the current exclusion constraining access to marriage.

1.49 The committee uses the term 'LGBTI' for Lesbian, Gay, Bisexual, Transgender, and Intersex persons. The committee acknowledges that the use of this term is disputed but uses the term in recognition of the fact that marriage equality is an issue across the broader LGBTI community.

Note on references

1.50 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

Acknowledgement

1.51 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

CHAPTER 2

Policy arguments for and against marriage equality

2.1 The vast majority of submissions received by the committee focussed only on broad policy arguments for or against marriage equality for same-sex couples, and not on the specific provisions of Senator Hanson-Young's Bill. This chapter summarises the main arguments for and against marriage equality, as presented in evidence during the course of the inquiry.

Arguments supporting marriage equality

2.2 The principal arguments advanced in support of marriage equality were:

- marriage equality will address the inequality and discrimination that same-sex couples confront in not being able to marry, noting that many same-sex couples value and wish to be able to participate in the institution of marriage;
- same-sex couples have a right to marry and a right to non-discrimination at international law;
- intersex and transgender people should be recognised in the definition of 'marriage' in the Marriage Act;
- marriage will provide psychological and health benefits to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people;
- there is increasing public support for marriage equality for same-sex couples, due to the recognition of marriage as a life-long, voluntary commitment between two people, regardless of their sex, sexual orientation or gender identity; and
- marriage equality for same-sex couples is recognised in an increasing number of overseas jurisdictions.

Addressing inequality and discrimination

2.3 One of the primary arguments put forward in support of marriage equality was that the Marriage Act discriminates against same-sex couples by prohibiting them access to marriage.[1] Submissions and witnesses argued that same-sex relationships are the same as, and equal to, marriage and deserve recognition as such. As Mr Justin Koonin from the NSW Gay and Lesbian Rights Lobby contended in evidence at the Sydney public hearing:

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1 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; National LGBTI Health Alliance, *Submission 157*, p. 4; Human Rights Law Centre, *Submission 161*, p. 1; Law Council of Australia, *Submission 178*, p. 17.

> We are here today asking for recognition of the depth of our relationships and the dignity of our sexuality. We are here for all those people in committed long-term same-sex relationships, who deserve the decency and respect of formal recognition.[2]

2.4 In a similar vein, Mr Malcolm McPherson from Australian Marriage Equality told the committee that marriage is about 'a committed, loving relationship...which is exactly the same whether you are straight, same-sex attracted, transgender or intersex'.[3]

2.5 Mrs Shelley Argent OAM, representing Parents and Friends of Lesbians and Gays, explained that the families and friends of same-sex couples want these relationships to be recognised as equal:

> As a parent, it is quite heartbreaking when I see that my one son has all the advantages and he has not done anything special to have those advantages, and yet my gay son...is the one with the relationship that is seen as second rate. He is now in a relationship with a really nice person, one of the nicest people you could meet. I would love to have this man in our family and call him a son-in-law. That is what it is. We see the relationships as just as valid, no more trivial or anything else.[4]

2.6 The committee also received evidence demonstrating the strong desire of some same-sex couples to marry. The submission by Australian Marriage Equality summarised the findings of several consultations on this point:

> In the 2005 Victorian [Gay and Lesbian Rights Lobby's, 'Not Yet Equal'] report, 45% of those surveyed would marry if they had the choice. This was up from 23% in a similar survey conducted in 2000. The 2007 NSW [Gay and Lesbian Rights Lobby's 'All Love is Equal, Isn't It?'] report gave a similar figure of 42%.
>
> The most recent study on this issue, by Dr Sharon Dane et al at the University of Queensland, called 'Not So Private Lives, the Ins and Outs of Same-Sex Relationships', found that 80% of same-sex partners support the right to marry and 55.4% would marry if they had the option.[5]

2.7 A number of submissions argued that marriage equality will strengthen the institution of marriage for all couples.[6] As Mr Justin Whelan from the Paddington Uniting Church articulated:

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2 *Committee Hansard*, 3 May 2012, p. 3. See also: Mr Senthorun Raj, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 3; the Hon Michael Kirby AC CMG, *Committee Hansard*, 3 May 2012, p. 12.

3 *Committee Hansard*, 3 May 2012, p. 5.

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

5 *Submission 260*, p. 81.

6 See, for example, Mr Brian Greig OAM, *Submission 64*, p. 2; Reverend Nathan Nettleton, South Yarra Community Baptist Church, *Submission 302*, p. 1.

> I believe the institution of marriage is under threat...I think marriage is under threat from a consumptive model of relationships in which loved ones are like a shiny object to discard at will. I think marriage is under threat from celebrities who get divorced hours after their weddings and are then still held up as role models. I think it is under threat from reality TV shows which offer marriage as the prize at the end of the shows. But I do not believe that marriage is under threat from people who love each other so much they want to commit to each other for their whole lives—and with the possibility of children—in public and with the support of the community. In fact, I think these people actually strengthen the institution of marriage.[7]

Civil unions and de facto relationships are not equal to marriage

2.8 As noted in chapter 1, the Australian Government's same-sex law reforms in 2008 were enacted to ensure that 'same-sex couples and their families are recognised and have the same entitlements as opposite-sex de facto couples'.[8] In addition, some states and territories offer formal recognition of same-sex relationships through civil union or relationship registry schemes. In its submission, the Australian Human Rights Commission summarised the different schemes that exist in the states and territories:

> Queensland, Tasmania and the ACT have civil union schemes through which couples may have an official ceremony. These three jurisdictions also provide mechanisms for recognising civil unions entered into in other states and other countries. New South Wales has a relationship registration scheme which recognises civil unions entered into in other states. However, there is no allowance for an official ceremony. Victoria also has a relationship registration scheme, although it does not recognise civil unions entered into in other states, and does not allow for an official ceremony. In South Australia, the Northern Territory and Western Australia, same-sex couples can only be recognised as a de-facto partnership – these jurisdictions do not, as yet, have civil union or relationship registration schemes.[9]

2.9 Submissions and witnesses supporting marriage equality argued that other forms of recognition, such as civil unions or partnerships, or de facto-equivalent

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7 *Committee Hansard*, 3 May 2012, p. 45.

8 Attorney-General's Department, *Same-Sex Reforms*, available at: http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/SameSexReforms.aspx (accessed 16 May 2012).

9 *Submission 116*, p. 6. See also: Margaret Brock and Dan Meagher, 'The legal recognition of same-sex union in Australia: A constitutional analysis', (2011) 22 *Public Law Review* 266, pp 273-274. The committee notes that, on 21 June 2012, the Queensland Parliament passed the Civil Partnerships and Other Legislation Amendment Bill 2012 (Qld), which amends the *Civil Partnerships Act 2011* (Qld) to remove provisions that allow a couple to hold a declaration ceremony, before a civil partnership notary, prior to the registration of the relationship: see Part 2, clause 13 of the Civil Partnerships and Other Legislation Amendment Bill 2012 (Qld).

status, are an inadequate means of addressing the discrimination that same-sex couples currently face. For example, Mr Rodney Croome AM from Australian Marriage Equality argued that civil unions, instead of removing discrimination, actually entrench it by reinforcing the sense that same-sex couples 'are somehow different'.[10]

2.10 In evidence at the Sydney hearing, the Hon Kristina Keneally MP made the point that relationship registers or civil unions devalue marriage for the whole community:

> You are setting up other forms of relationship that undercut marriage – that is, making other forms of union possible, not just for homosexuals but for heterosexuals. You undermine the institution of marriage when you legalise other forms of relationship rather than grant the right to enter the institution of marriage to same-sex and heterosexual couples.[11]

2.11 Professor Andrew Lynch from the Gilbert and Tobin Centre of Public Law considered that the Australian Government's 2008 same-sex law reforms merely serve to highlight 'the core or primary discrimination experienced by those couples relative to differently sexed couples, which is the ability to choose to have their relationship formally recognised by the state and to obtain the full legal protections of marriage'.[12]

2.12 The Law Council of Australia, while welcoming the law reforms in 2008, noted that 'removing financial discrimination only addresses a particular aspect of discrimination':

> If same-sex couples were able to marry, they could more easily access entitlements available to opposite sex couples as a result of marriage. They could also enjoy recognition as equal citizens entitled to the dignity and respect which is fundamental to the concept of human rights.[13]

2.13 In his personal submission to the inquiry, Mr Croome also pointed out that the differences in the rights of de facto couples under relevant state and territory legislation disadvantages same-sex couples:

> Some [states and territories] allow same-sex couples equal recognition as parents, others don't. The hurdles couples have to jump over to be deemed

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10 *Committee Hansard*, 3 May 2012, p. 5. See also: New South Wales Gay and Lesbian Rights Lobby, *Submission 109*, p. 3; the Hon Don Harwin MLC, *Submission 217*, p. 1; Professor M.V. Lee Badgett, *Submission 293*, pp 3-4.

11 *Committee Hansard*, 3 May 2012, p. 13.

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

13 Law Council of Australia, answer to question on notice, received 11 May 2012, p. 3. See also: Defence Lesbian, Gay, Bisexual, Transgender and Intersex Information Service, *Submission 238*, p. 1.

> de factos also vary. In contrast, marriage provides the same rights and responsibilities wherever you live in Australia.[14]

Community recognition of marriage equality

2.14 Submissions and witnesses also argued that civil unions (or other schemes providing for the formal recognition of relationships) do not have the same level of recognition as marriage within the broader community.[15] The Peter Tatchell Foundation used the example of the United Kingdom's same-sex civil partnerships to demonstrate this point:

> Civil partnerships are viewed as marriages by a minority of people (mostly by those who have had them). They are not publicly or officially recognised as marriages. Nor are they deemed by most people to be on a par with marriage.
>
> One of the biggest practical complaints is that unlike [marriages] UK civil partnerships are not recognised abroad. This means that when civil partners go overseas on holiday, or relocate to another country, they have no legal recognition or rights. This creates serious problems when one partner falls ill, has an accident or dies.[16]

2.15 Ms Sophia Alex-Bailey, representing Rainbow Tasmania, spoke to the committee about the significance of 'getting married':

> [W]hen it all comes down to it and you want to tell your mum and dad and your extended family something, you do not want to sit down and say: 'You know what? I'm having a civil ceremony.' You want to say, 'I love someone and I'm getting married...It does not have the same value in the community if you cannot say the word marriage.[17]

2.16 Similarly, Professor M.V. Lee Badgett noted the 'rich cultural meaning and emotional value of marriage' compared with the 'dry accounting-like connotation of "registered partnership"'.[18]

Marriage equality provides security

2.17 Supporters of marriage equality drew attention to the security that marriage would provide for same-sex couples and their families.

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14 *Submission 57*, p. 6.

15 For example, Australian Marriage Equality, *Submission 260*, p. 86; Mrs Shelley Argent OAM, Parents and Friends of Lesbians and Gays, *Committee Hansard*, 3 May 2012, p. 7.

16 *Submission 276*, p. 3.

17 *Committee Hansard*, 4 May 2012, p. 33.

18 *Submission 293*, pp 3-4.

2.18 For example, submissions and witnesses highlighted the importance of having a relationship instantly recognised in times of medical emergency. Mr Stephan Elliott described his personal experience, following an accident:

> I had [a] near-death skiing accident in 2004 and I was told I was going to die and my partner of 20 years wasn't allowed in the back of the ambulance with me because he wasn't considered family. A marriage certificate is not just a piece of paper, it is irrefutable evidence of a recognised and legally protected relationship. This recognition and protection is currently denied to same-sex couples in some of the most vulnerable and critical moments in our lives.[19]

2.19 In their submission, Dr John Challis and Mr Arthur Cheeseman noted the additional trauma caused to a surviving partner at a time of bereavement in having to provide evidence of a relationship after the death of their long-term partner.[20]

2.20 Professor M.V. Lee Badgett provided the committee with the following summary from research she has conducted in Massachusetts in the United States in relation to the security marriage provides for children of same-sex couples:

> Many parents reported that their children felt more secure and protected. Others noted that their children gained a sense of stability. A third common response was that marriage allowed children to see their families as being validated or legitimated by society or the government...
>
> Parents also reported that marriage made it easier for other people to understand their families. The common social understanding of marriage gave children a way to describe their parents' relationship to their friends and gave parents an understandable relationship to use in dealing with the institutions and people who affected their children's daily life. The most notable situation mentioned concerned children's schools, as well as other government agencies or family members.[21]

Rights to marriage and non-discrimination at international law

2.21 During the course of the inquiry, supporters of marriage equality and proponents of the status quo debated whether the 'right to marry' in international human rights agreements extends to same-sex couples.[22] Supporters of marriage

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19 *Submission 211*, p. 1. See also: Mr Rodney Croome AM, Australian Marriage Equality, *Committee Hansard*, 3 May 2012, p. 5; Ms Gina Wilson, Organisation Intersex International Australia, *Committee Hansard*, 3 May 2012, p. 57.

20 *Submission 291*, p. 3. See also: Inner City Legal Centre, *Submission 173*, pp 8-9.

21 *Submission 293*, p. 3.

22 See, for example, Castan Centre for Human Rights Law, *Submission 356*, pp 7-9; Ambrose Centre for Religious Liberty, *Submission 156*, pp 3-6.

equality for same-sex couples also noted the right to non-discrimination which exists at international law.[23]

Relevant human rights treaties

2.22 The most relevant international human rights treaties in the context of the issue of marriage equality are:

- *Universal Declaration of Human Rights (UDHR)*[24]

  Article 16(1) – Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

- *International Covenant on Civil and Political Rights (ICCPR)*[25]

  Article 2(1) – Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

  Article 23(1) – The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

  Article 23(2) – The right of men and women of marriageable age to marry and to found a family shall be recognised.

  Article 26 – All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.23 Those supporting legislative recognition of marriage equality argued that the language of Article 16 of the UDHR and Article 23 of the ICCPR is sufficiently broad to encompass a right to marriage for same-sex couples. For example, the Hon Michael Kirby AC CMG observed that 'a lot of writing in the field...says the language [of the UDHR] is conformable with this being an emerging human right'.[26]

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23 Australian Lawyers for Human Rights, *Submission 137*, pp 4-5 and Human Rights Law Resource Centre, *Submission 161*, Attachment 1, p. 4 discuss the non-discrimination provisions in a number of international treaties to which Australia is a party.

24 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

25 *International Covenant on Civil and Political Rights* [1980] ATS 23, signed 16 December 1966, entry into force for Australia (except Article 41) 13 November 1980.

26 *Committee Hansard*, 3 May 2012, pp 10-11.

2.24 Australian Lawyers for Human Rights contended that the meaning of a treaty's terms is not static and must be interpreted within the framework of the legal system prevailing at the time of interpretation:

> [Although] textual analysis of the ICCPR might suggest that Article 23 should be read as only allowing heterosexual union, the text on its face does not demand such a restrictive interpretation and must be read in light of developments in law and State practice.[27]

2.25 Australian Lawyers for Human Rights preferred a purposive interpretation of the relevant international treaties, arguing that the aim of 'Article 16 of the [UDHR] (from which Article 23 [of the] ICCPR was drawn) is not to protect heterosexual marriage but to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage'.[28]

International case law

2.26 A number of submissions referred to the case of *Joslin et al v New Zealand* (Joslin case)[29] – a United Nations Human Rights Committee (UNHRC) decision in 2002 in which lesbian couples sought marriage licences under the *Marriage Act 1955* (NZ).[30] In relation to Article 23 of the ICCPR, the UNHRC found:

> Use of the term – men and women, rather than the general terms used elsewhere in [the ICCPR], has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the [ICCPR] is to recognize as marriage only the union between a man and a woman wishing to marry each other.[31]

2.27 However, there are legal decisions in other overseas jurisdictions which have supported a broader interpretation of international human rights agreements than the

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27 *Submission 137*, p. 7.

28 *Submission 137*, p. 8. Also see: Professor Ben Saul, Sydney Centre for International Law, University of Sydney, *Submission 45*, p. 1; Women's Law Centre of Western Australia, *Submission 108*, p. 2.

29 *Joslin et al v New Zealand*, United Nations Human Rights Committee, (2002) UN Doc CCPR/C/75/D/902/1999.

30 See Gilbert and Tobin Centre of Public Law, *Submission 61*, p. 4; Australian Lawyers for Human Rights, *Submission 137*, pp 5-7; Public Interest Advocacy Centre, *Submission 138*, pp 5-6; Australian Christian Lobby, *Submission 147*, p. 34; Law Council of Australia, *Submission 178*, pp 15-16; Australian Marriage Equality, *Submission 260*, pp 98-99; Castan Centre for Human Rights Law, *Submission 356*, pp 8-9.

31 *Joslin et al v New Zealand*, United Nations Human Rights Committee, (2002) UN Doc CCPR/C/75/D/902/1999, para 8.2.

UNHRC in the Joslin case.[32] For example, the Australian Human Rights Commission cited a case in the South African Constitutional Court which declined to follow the approach taken in the Joslin case. In the South African case, the court 'said the reference to the right of men and women to marry in Article 16(1) of the [UDHR] was "descriptive of an assumed reality, rather than prescriptive of a normative structure for all time" before observing "rights, by their nature, will atrophy if they are frozen"'.[33]

2.28 In his submission, the Hon Michael Kirby noted that increasingly such court decisions 'have upheld the principle of marriage equality for opposite sex and same sex couples'.[34]

2.29 The Castan Centre for Human Rights Law argued that, due to changing societal attitudes to same-sex marriage, the right to marry in Article 23 of the ICCPR would come to be interpreted 'through the lens' of Article 26 of the ICCPR (the right against discrimination):

> It was also argued in Joslin, that the Marriage Act breached Article 16 (the right to recognition as a person before the law), Article 17 (unlawful interference with privacy and family) and, most importantly, Article 26, which prohibits discrimination. The [UNHRC] did not address these arguments on the basis that the specific rule in Article 23 overruled the other more general rules. It is likely that the [UNHRC] would have struggled to justify an argument that New Zealand's Marriage Act is not discriminatory, if it had specifically considered the Article 26 claim.[35]

2.30 The Public Interest Advocacy Centre (PIAC) also pointed out that there are a number of reasons the majority approach in the Joslin case 'should be approached with great caution', including that the Joslin case was heard a decade ago and a number of United Nations member states have now recognised same-sex marriages and/or civil unions for same-sex couples:

> This suggests a consensus starting to develop against the continuation of discrimination against same-sex couples wishing to marry. Thus, PIAC contends that the better view is that the failure to recognise a right to marry when a couple is recognised as a family in other areas of law is inconsistent with Article 26 of the ICCPR because it denies a particular kind of

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32 See Australian Human Rights Commission, *Submission 116*, pp 5-6, referring to the South African case of *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04;CCT10/05. See also: the Hon Michael Kirby AC CMG, *Submission 74*, pp 7-8, which refers to eight cases in overseas jurisdictions that have upheld the principle of marriage equality for same-sex couples, including *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs.*

33 Australian Human Rights Commission, *Submission 116*, pp 5-6.

34 *Submission 74*, p. 7.

35 *Submission 356*, p. 9. See also: Australian Human Rights Commission, *Submission 116*, p. 5.

> recognition to some couples on the discriminatory ground of their gender or sexuality.[36]

2.31 Submissions also noted case law supporting an argument that prohibition of same-sex marriage breaches the right to non-discrimination at international law. In this context, a number of submissions referred to the UNHRC's decision in the case of *Toonen v Australia*.[37] In *Toonen*, the UNHRC explicitly stated that the interpretation of the term 'sex' in Articles 2(1) and 26 of the ICCPR extends to sexual orientation, meaning that discrimination based on sexual orientation is prohibited.[38]

2.32 Opponents of marriage equality also referred to cases of the European Court of Human Rights in support of the argument that there is no right at international law for same-sex couples to marry.[39] For example, the Ambrose Centre for Religious Liberty noted the case of *Schalk and Kopf v Austria* (Schalk)[40] – a European Court of Human Rights decision in 2010 – which clarified that the *European Convention of Human Rights*[41] does not oblige member states to legislate for, or legally recognise, marriages between same-sex couples.[42]

2.33 However, as Ms Kate Eastman from the Law Council of Australia emphasised in evidence, the important point to note from the decision in Schalk is that there is no *impediment* to states recognising marriage equality:

> The clear message I read from the European court's decision [in Schalk] is that there is no positive obligation on the state to make same-sex marriage permissible in domestic law, but, far more importantly, there is no impediment to it. The international human rights law regime makes clear

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36 *Submission 138*, pp 5-6.

37 *Toonen v Australia*, United Nations Human Rights Committee, (1994) UN Doc. CCPR/C/50/D/488/92.

38 See, for example, Amnesty International Australia, *Submission 58*, p. 3; Australian Human Rights Commission, *Submission 116*, pp 4-5; Australian Lawyers for Human Rights, *Submission 137*, p. 5.

39 See, for example, National Marriage Coalition, *Submission 134*, p. 11; Australian Christian Lobby, *Submission 147*, p. 34; Australian Marriage Forum, *Submission 199*, p. 7.

40 European Court of Human Rights, Application No. 30141/04, 24 June 2010.

41 *European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, opened for signature 4 November 1950, entered into force 3 September 1953.

42 *Submission 156*, pp 5-6. Submissions also referred to the case of *Gas and Dubois v France* (European Court of Human Rights, 'The refusal to allow a woman to adopt her same-sex partner's child was not discriminatory', *Press Release*, ECHR 108 (2012), 15 March 2012, p. 3) as reaffirming the decision in Schalk: National Marriage Coalition, *Submission 134*, p. 11; Australian Christian Lobby, *Submission 147*, p. 34; Australian Marriage Forum, *Submission 199*, p. 7.

> that there is no impediment to states recognising same-sex marriage if that is what the state thinks appropriate to do.[43]

Recognition of the rights of intersex and transgender people

2.34 Some submissions and witnesses argued that the issue of marriage equality is not only about lesbian and gay couples, it is also an important issue for intersex[44] and transgender people, who are often overlooked in the debate on marriage equality for 'same-sex' couples.[45]

2.35 The committee was informed that the current definition of 'marriage' in the Marriage Act does not provide clarity for intersex and transgender persons on the validity of their marriages, and the limited case law in this area does not appear to have provided certainty on this issue.[46]

2.36 The Organisation Intersex International Australia observed that the Marriage Act currently defines marriage as between a man and a woman, but 'makes no attempt to clarify exactly what a man or woman is'.[47] The Organisation Intersex International Australia referred to the Family Court of Australia case of *C and D (falsely known as C)* (C and D)[48] where the court considered the validity of the marriage of an intersex person:

> Intersex [people] are not wholly male or female and in the matter of C and [D] his honour found that being of indeterminate sex [, intersex persons] were barred from marriage. The intersex individual in that matter had undergone significant surgery to confirm a male sex assignment and had cardinal documents revised to reflect that surgery...[49]

2.37 Some submissions also referred to the case of *Re Kevin: Validity of the marriage of a Transsexual* (*Re Kevin*),[50] a case involving the marriage of a person described as a 'post-operative female to male transsexual' to a female. In *Re: Kevin*, the Family Court at first instance found (and upheld on appeal to the Full Court) that 'Kevin' was a male at the date of his marriage, and as such, his marriage was valid

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43 *Committee Hansard*, 3 May 2012, p. 20.

44 The Organisation Intersex International Australia explained that the term 'intersex' refers to people whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or other sex: Organisation Intersex International Australia, *Submission 198*, p. 1.

45 See Inner City Legal Centre, *Submission 173*, p. 4.

46 Organisation Intersex International Australia, *Submission 198*, p. 3.

47 *Submission 198*, p. 2.

48 (1979) 35 FLR 340.

49 *Submission 198*, pp 2-3.

50 (2001) 28 Fam LR 158.

under Australian law.[51] The Inner City Legal Centre contended that the case of *Re Kevin* 'disapproved the ruling in C and D', namely:

> The finding in [*Re Kevin*] would have the effect that if an intersex person were to adopt a gender...then that person would be entitled to marry someone of the opposite gender.[52]

2.38 The Organisation Intersex International Australia disputed that *Re Kevin* has settled this issue for intersex persons who have adopted a gender, arguing that 'irrespective of surgery or other medical interventions if [a person] is born Intersex [that person] remains intersex'.[53]

2.39 The Inner City Legal Centre pointed out that transgender people also face uncertainty with regards to the validity of their marriages:

> A transgender person may wish to marry their same sex partner using their old birth certificate, meaning the marriage is 'heterosexual' in theory but gay or lesbian in practice; and
>
> A marriage where one person transitions is placed in a position where the couple must separate if the transgender partner wishes to amend their birth certificate.[54]

2.40 A number of submissions recommended that any amendments to the Marriage Act to provide for marriage equality for same-sex couples should also address the issues faced by intersex and transgender persons.[55]

Psychological and health benefits of marriage equality

2.41 Several submitters and witnesses pointed out that the institution of marriage is associated with positive physical and mental health benefits.[56] For example, the National LGBTI Health Alliance argued:

> Marriage is positively associated with a large number of outcomes including better mental and physical health for adults, improved cognitive, emotional and physical well-being for children, and greater economic advantage for family members...Research indicates that marriage affords social recognition and thereby improves health, socioeconomic

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51 See Inner City Law Centre, *Submission 173*, pp 3-4. See also: Law Council of Australia, *Submission 178*, pp 6-9.

52 *Submission 173*, p. 4.

53 *Submission 198*, p. 3.

54 *Submission 173*, p. 4.

55 See, for example, Inner City Legal Centre, *Submission 173*, p. 4; Organisation Intersex International Australia, *Submission 198*, p. 3.

56 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; National LGBTI Health Alliance, *Submission 157*, p. 5; Dr Fiona Barlow, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, pp 47-48.

> achievement, civic participation and involvement with extended family members.[57]

2.42 Those supporting marriage equality argued that amending the Marriage Act would enable same-sex couples to access these health benefits. As Dr Fiona Barlow from Psychologists for Marriage Equality explained:

> Being happier and healthier is something that same-sex attracted people desperately need. Same-sex relationships can be committed, loving, and monogamous in the same way that any other special pair bond can be. States and countries that support same-sex marriage have seen happiness and health boost in same-sex attracted people. On the other hand, opposing same-sex marriage makes same-sex attracted people feel lonely, powerless and weak.[58]

2.43 Psychologists who submitted to the inquiry highlighted that sexual minorities generally have poorer mental and physical health outcomes than the general population, with homosexual and bisexual individuals faring significantly worse than heterosexuals in measures such as rates of homelessness, smoking, chronic health conditions, psychological distress, and suicidal thoughts and attempts.[59]

2.44 Several submissions observed that there is a clear link between discrimination against sexual minority groups and poor health outcomes. For example, the Australian Medical Students' Association argued that discrimination 'is an important cause of the health inequities experienced by LGBTI populations'.[60]

2.45 A number of submissions asserted that a lack of relationship recognition for same-sex couples is a significant contributing factor to feelings of discrimination, which in turn lead to poorer health outcomes.[61] As Psychologists for Marriage Equality argued:

> [T]he Australian government's current Marriage Act (2004), which restricts marriage to only heterosexual couples, is directly reinforcing high levels of social stigma directed towards individuals who are gay or lesbian. This in

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57 National LGBTI Health Alliance, *Submission 157*, p. 5. See also: Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; Dr Fiona Barlow, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, pp 47-48.

58 *Committee Hansard*, 4 May 2012, p. 47.

59 Psychologists for Marriage Equality, *Submission 201*, p. 3; Australian Psychological Society, *Submission 261*, p. 5. Research from the Drug Policy Modelling Program, University of New South Wales, also indicates that homosexuals as a minority group in Australia may be up to twice as likely as heterosexuals to develop alcohol and other drug problems: see *Submission 103*, p. 1.

60 *Submission 133*, p. 2. See also: National LGBTI Health Alliance, *Submission 157*, p. 4; Australian Marriage Equality, *Submission 260*, p. 43.

61 National LGBTI Health Alliance, *Submission 157*, p. 4; ACON, *Submission 177*, pp 2-3; Australian Psychological Society, *Submission 261*, p. 7.

> turn has lead to an unsatisfactory level of psychiatric illness within the community. The associated burden of disease has wide-reaching implication, both from a social but also economic position.[62]

2.46 Opponents of Senator Hanson-Young's Bill questioned whether legislating for marriage equality would in fact change mental health outcomes among the homosexual community in Australia.[63] Submissions supporting marriage equality argued, however, that marriage equality will in fact provide positive health impacts.[64] For example, in the National LGTBI Health Alliance's view, legislating for marriage equality 'will reduce prejudice against lesbian, gay and bisexual people and their children in Australia, and contribute to the improved wellbeing of a significant part of the population'.[65]

Public support for marriage equality

2.47 Proponents of marriage equality for same-sex couples argued that '[s]ame-sex marriage is an idea whose time has come'.[66] In particular, submissions referred to opinion poll results to indicate support for marriage equality within the Australian community.[67]

2.48 Australian Marriage Equality's submission, for example, noted that support for marriage equality has been increasing since 2004.[68] In 2004, a poll commissioned by SBS Television found that 38 per cent of those surveyed supported marriage equality, with 44 per cent opposed and 18 per cent undecided. In October 2010, a Galaxy poll found that 62 per cent of Australians support marriage equality, and a

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62 Psychologists for Marriage Equality, *Submission 201*, p. 1.

63 See, for example, Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 28; Dr David van Gend, Australian Marriage Forum, *Committee Hansard*, 4 May 2012, p. 27.

64 See, for example, ACON, *Submission 177*, p. 3. ACON cited a study from Massachusetts in the United States which showed that healthcare costs and mental health visits by gay men declined by a statistically significant amount in the year after legislative reforms relating to marriage equality were introduced in that state.

65 National LGBTI Health Alliance, *Submission 157*, p. 5. See also: Drug Policy Modelling Program, University of New South Wales, *Submission 103*, p. 1. ACON, *Submission 177*, pp 2, 4; Australian Psychological Society, *Submission 261*, p. 10.

66 Peter Tatchell Foundation, *Submission 276*, p. 4. See also: Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 40.

67 See, for example, the Hon Trevor Khan MLC, *Submission 110*, p. 17; Australian Lawyers for Human Rights, *Submission 137*, pp 2-3; Australian Marriage Equality, *Submission 260*, pp 18-19.

68 *Submission 260*, pp 18-19. See also: the Hon Trevor Khan MLC, *Submission 110*, p. 17.

Roy Morgan poll in August 2011 found that 68 per cent of Australians support marriage equality.[69]

2.49 In addition, Australian Marriage Equality referred to a Galaxy poll conducted in May 2011, which found that 75 per cent of Australians believe that it is 'inevitable' that marriage equality will become law.[70]

2.50 Australian Lawyers for Human Rights also referred to opinion polls as 'strong and consistent evidence that the majority of Australians support marriage equality, and that support is likely to be enduring'.[71] In particular, Australian Lawyers for Human Rights noted support for marriage equality within specific groups in the community traditionally believed to oppose marriage equality:

> Even allowing for religious beliefs, 53% of Christians polled by Galaxy Research conducted in August 2011 supported same-sex marriage. In the same survey, people of other religions polled their support at 62%, and people of no religious affiliation polled their support at 67%.
>
> The assumption that only people in a particular group or demographic display majority support for marriage equality is not borne out in the results of the opinion polls. Polling showed that 59% of rural and regional dwellers support marriage equality, 57% of men support marriage equality, and 57% of blue-collar workers support equality.[72]

2.51 Proponents of marriage equality argued that the increasing public support for marriage equality indicates a widely held view that marriage is a life-long, voluntary commitment, regardless of a couple's sex, sexual orientation or gender identity. As Mr Croome explained to the committee at the public hearing in Sydney:

> [M]ost Australians today understand that marriage at the most fundamental level is...about a lifelong relationship based on love, commitment, responsibility and respect. As poll after poll shows, the majority of Australians understand that this definition of marriage, their definition, easily encompasses same-sex partners.[73]

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69 Ambrose Centre for Religious Liberty also referred to its polling which showed that 58 per cent of Australians agree that same-sex couples should have the right to marry, however, only 49 per cent support changing the Marriage Act to include same-sex marriage: Ambrose Centre for Religious Liberty, *Submission 156*, p 13; Ambrose Centre for Religious Liberty, *Public attitudes towards same-sex marriage in Australia: report of research findings*, 22 November 2011, p. 8, available at: www.ambrosecentre.org.au (accessed 24 May 2012).

70 *Submission 260*, p. 19.

71 *Submission 137*, p. 2.

72 *Submission 137*, pp 2-3.

73 *Committee Hansard*, 3 May 2012, p. 2.

Recognition of marriage equality in other jurisdictions

2.52 Supporters of marriage equality for same-sex couples pointed to the growing number of overseas jurisdictions which have legislated for marriage equality, or are considering such legislation. Marriage equality is currently recognised in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland and Argentina, as well as several states in the continental United States and Mexico City. Further, the legalisation of marriage equality is under consideration in Denmark, the United Kingdom, Ireland, Brazil, Mexico, Colombia, Finland, Nepal, Slovenia, France, and Paraguay.[74]

2.53 The committee also notes that the President of the United States of America and the New Zealand Prime Minister have both recently announced their support for the legal recognition of same-sex marriage;[75] and the new French President campaigned for election on a platform of marriage equality.[76]

2.54 The New South Wales Gay and Lesbian Rights Lobby argued that Australia is 'falling behind comparable jurisdictions' by failing to legislate for marriage equality.[77] Similarly, Australian Lawyers for Human Rights observed:

> [T]he proposed amendments [in Senator Hanson-Young's Bill] would bring Australia, as a modern, liberal and democratic state, into line with developments in other such states who have in past decades moved to liberalising marriage.[78]

Arguments opposing marriage equality

2.55 During the committee's inquiry, submissions and witnesses opposing marriage equality for same-sex couples (or expressing support for the status quo) advanced a number of arguments, in particular:

- marriage is, and should remain, between a man and a woman;
- children need both a biological mother and a biological father;
- the Marriage Act, as currently drafted, is not discriminatory;
- there is no 'right to marriage' for same-sex couples; and

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74 Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, pp 40-41; Australian Marriage Equality, *Submission 260*, pp 16-18; Castan Centre for Human Rights Law, *Submission 356*, pp 19-28.

75 See Julie Pace, *Associated Press*, 'Obama voices his support for gay marriage', 10 May 2012; *The Australian*, 'New Zealand PM John Key open to gay marriage', 11 May 2012.

76 *The Guardian*, 'Gay rights campaigners around the world hail Obama's message of support', 10 May 2012.

77 *Submission 109*, p. 2.

78 *Submission 137*, p. 16.

- marriage equality for same-sex couples is a 'slippery slope' to the recognition of other relationships, such as polygamous relationships, as marriage.

Marriage is between a man and a woman

2.56 One of the primary reasons put forward by those opposing marriage equality is that marriage has been understood throughout history and across all cultures, religions, and people groups as being a 'unique' male-female union.[79]

Religious objections to marriage equality

2.57 The Australian Christian Lobby observed that the current definition of marriage in the Marriage Act (although only inserted in 2004) 'codified its historic meaning, one that has been held in the Christian tradition for millennia'.[80] Further, the Australian Christian Lobby argued that the view that marriage can only be between a man and a woman, is not just a Christian position, it is 'a position held dearly by many Australians'.[81]

2.58 Similarly, the submission by the Rabbinical Council of Victoria noted that the current definition of marriage is consistent with 'the millennia-old definition of marriage expressed in Jewish texts and accepted throughout the ages by the other major world religions'.[82]

2.59 A number of submissions and witnesses also referred to the origins of marriage in the Bible as the basis for marriage today.[83] Rabbi Gutnick from the Organisation of Rabbis in Australasia explained to the committee that, in his view, the civil institution of marriage is based on religious foundations:

> I believe that our civil [A]ct was designed in order to promote the ability to be married in accordance with Jewish law, with the Church of England, with the Roman Catholic law et cetera, instead of under one canon law...Until someone can show me in the Bible or in religious writings that God wants same-sex marriage I cannot say otherwise. I believe secular marriage is nevertheless based upon that original [founding] principle.[84]

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79 Australian Christian Lobby, *Submission 147*, p. 3; Focus on the Family Australia, *Submission 150*, p. 1; Mr Rocco Mimmo, Ambrose Centre for Religious Liberty, *Committee Hansard*, 3 May 2012, p. 28.

80 *Submission 147*, p. 3.

81 *Submission 147*, p. 4.

82 *Submission 231*, p. 1. See also: Organisation of Rabbis of Australasia, *Submission 145*, p. 1.

83 See, for example, Association for Reformed Political Action, *Submission 118*, p. 1; National Marriage Coalition, *Submission 134*, pp 3-4; Church and Nation Committee of the Evangelical Presbyterian Church of Australia, *Submission 155*, p. 1; Rabbi Moshe Gutnick, Organisation of Rabbis of Australasia, *Committee Hansard*, 3 May 2012, p. 36.

84 *Committee Hansard*, 3 May 2012, p. 40.

2.60 Similarly, the Episcopal Assembly of Oceania argued:

> Marriage is regarded above all as a **sacrament** that has been instituted by God who created man and woman in His own image and likeness (Genesis 1:27-31). There is a strong biblical basis for this view, and the position of the Orthodox Church worldwide (not only in Australia) can never depart from the teaching of Holy Scripture. The union between a man and a woman in the Sacrament of Marriage reflects the union between Christ and His Church (Ephesians 5:21-33).[85]

2.61 In addition to highlighting the importance of marriage as between a man and a woman on religious grounds, submissions also referred to the prohibition of homosexual relationships in some religions.[86] For example, the Presbyterian Church of Queensland argued:

> The [Marriage Act] should not be further amended to allow same sex 'marriage' even though homosexual practice between consenting adults is not illegal in Australia and its Territories, because homosexual practice is a sinful act in the sight of God, and because the status of marriage will be eroded.[87]

2.62 Focus on the Family noted:

> The five major world religions, Buddhism, Christianity, Hinduism, Islam, and Judaism recognise and uphold the natural, heterosexual understanding of marriage. By contrast, these religions teach that homosexual behaviour is sinful or wrong...
>
> [T]he Bible clearly proscribes any form of homosexual behaviour as sinful. As such, it is not and cannot be the basis for a sacred marriage relationship.[88]

2.63 The Organisation of Rabbis of Australasia distinguished between 'tolerating' homosexual relationships and recognising them as marriage:

> [W]hile tolerance for individuals who are in homosexual relationships is consistent with the core values of Judaism, there is a great difference between tolerance for an individual and recognition of a movement which wishes to turn something clearly prohibited by Judaeo-Christian standards into something not only tolerated, but recognised and indeed solemnised by being included in the institution of marriage.[89]

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85 *Submission 106*, p. 1 (emphasis in original).

86 See, for example, Presbyterian Church of Queensland, *Submission 105*, p. 1; Institute for Judaism and Civilisation, *Submission 146*, p. 9; Focus on the Family, *Submission 150*, pp 3-4.

87 *Submission 105*, p. 1.

88 *Submission 150*, p. 3.

89 *Submission 145*, p. 1.

2.64 Supporters of marriage equality disputed the characterisation of marriage by opponents of Senator Hanson-Young's Bill as an unchanging institution that could only occur between a man and a woman. Many submissions focussed on how marriage has evolved in order to adapt to changes in societies and cultures.[90] The NSW Gay and Lesbian Rights Lobby summarised the changes in marriage which have occurred over the last century:

> Over time, we have seen the regulation of marriage adapt to different cultural and historical circumstances. Less than a century ago women were seen as chattels or property for transaction through a marriage contract, no provisions were made for no-fault divorce, and marital rape exemptions existed until the mid 1980s. Mixed race marriages were prohibited on the basis that having 'mixed blood' children was seen as a threat to the preservation of distinct racial lineages.[91]

2.65 Mr Christopher Puplick AM and Mr Larry Galbraith, among others, challenged the perception that marriage between same-sex couples is only a recent occurrence, noting historical instances of such marriage in Ancient Rome, Spain and China.[92]

Marriage is for procreation

2.66 Proponents of the status quo focussed on marriage as being between a man and a woman for the purpose of procreation. For example, the Ad Hoc Interfaith Committee argued:

> What we can say about marriage is that, despite varying cultural expressions in customs and rituals, across all cultures and eras it has been the union of a man and a woman who make a permanent and exclusive commitment to each other, of the type that is fulfilled by bearing and rearing children together. Marriage involves a comprehensive union of spouses, with norms of permanence and exclusivity. These combine to create a special link to children, for their sake, that protects their identity and nurture by a mother and father.[93]

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90 See, for example, Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2; the Hon Trevor Khan MLC, *Submission 110*, pp 8-9. See also: Mr Justin Koonin, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 3; Mr Ben Callegari, Psychologists for Marriage Equality, *Committee Hansard*, 4 May 2012, p. 52.

91 *Submission 109*, p. 5. See also: Australian Marriage Equality, *Submission 260*, p. 55; Parents and Friends of Lesbians and Gays, *Submission 3*, p. 2.

92 *Submission 193*, pp 54-55. See also: Australian Marriage Equality, *Submission 260*, p. 56. In this context, the Castan Centre for Human Rights Law noted that the 'banning of same-sex marriage went hand-in-hand with the broader legal limitations imposed on homosexual behaviours...from the 13th century onwards': *Submission 356*, p. 5.

93 *Submission 202*, p. 5. See also: FamilyVoice Australia, *Submission 101*, p. 3; Reverend Stefan Slucki, Presbyterian Church of Australia, *Committee Hansard*, 3 May 2012, p. 35.

2.67 In contrasting same-sex relationships with marriage between a man and a woman, Mr Chris Meney, representing the Australian Catholic Bishops Conference, told the committee:

> [A]lthough the community formed by a homosexual couple may involve genuine caring, affection and commitment to each other, it is not an inherently procreative community because their sexual relationship is not designed to generate children. Marriage is not simply a loving, committed relationship between two people but a unique kind of physical and emotional union which is open to the possibility of new life.[94]

2.68 The Australian Catholic Bishops Conference expressed the view that 'same-sex marriages would be quite different in nature and purpose [to a marriage between a man and a woman]. [T]hey therefore should not be called the same thing'.[95]

2.69 His Eminence Cardinal George Pell AC, Archbishop of Sydney, made a distinction with heterosexual couples who cannot, or do not, have children:

> They are still married because their sexual union is naturally designed to give life, even if it cannot give life at a particular point in time, or ever. Marriage between a man and a woman always has an inherent capacity for, and orientation towards, the generation of children, whether that capacity is actualized or not.[96]

2.70 A number of submissions in support of marriage equality emphasised that, for various reasons, many heterosexual marriages never produce children. They questioned why these heterosexual couples should be able to marry while same-sex couples should not.[97]

2.71 In his submission, Mr Brian Greig OAM contested this line of reasoning, arguing that there is no 'fertility' test for marriage:

> You do not have to have children if you get married. You do not have to be married to have children. Many heterosexual people marry with the intention of not having children, either for medical reasons, age or because

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94 *Committee Hansard*, 3 May 2012, p. 33.

95 *Submission 234*, p. 7.

96 *Submission 113*, pp 1-2. See also: National Marriage Coalition, *Submission 134*, p. 11; Australian Catholic Bishops Conference, *Submission 234*, p. 5.

97 See, for example, the Hon Michael Kirby AC CMG, *Submission 74*, pp 9-10; Australian Lawyers for Human Rights, *Submission 137*, p. 10; Lawyers and academics from Deakin University School of Law, *Submission 189*, p. 6; Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, p. 61; Australian Marriage Equality, *Submission 260*, p. 61.

> they simply do not wish to have a family. Married couples who choose not to have children are not required to divorce.[98]

Protection of children by the state

2.72 Some submissions and witnesses argued that, because marriage gives rise to the possibility of children, the state is involved in the regulation of marriage. In contrast, same-sex relationships should be treated differently because they do not.[99] As the Presbyterian Church of Victoria (Church and Nation Committee) explained:

> [M]arriage has always been of interest to the state, primarily because marriage protectively encases a child in his or her natural family unit. The wellbeing of children is essential to the future functioning of the state and of society and hence the state has a duty to protect and guard the deposit of its future resource wisely. In this way, although marriage can exist without government or state, as it did in the beginning, it is obviously beneficial for the state to safeguard its position as the cornerstone of our society.[100]

2.73 The Australian Family Association argued:

> [G]iven that same-sex relationships are not conducive to human reproduction in the same way that heterosexual relationships are, they don't attract the *same* kind of recognition from the state. That is to say, same-sex and opposite-sex relationships are different in a deeply significant way, and so, quite sensibly, they are treated differently.[101]

2.74 Similarly, the Australian Marriage Forum contended that marriage exists for the 'typical case of marriage' – being that which creates children – and that there is no need for the state to be involved in the regulation of other unions which do not produce children:

> If marriage did not [have the] momentous consequence, typically, of creating a child who needs stable care over prolonged periods, there would be no need to urge a marriage contract on adults entering a sexual relationship...Self-evidently, homosexual relations cannot create children, so society has no institutional interest in regulating such friendships.[102]

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98 *Submission 64*, p. 3. See also: Mr Senthorun Raj, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 3 May 2012, p. 4; Ms Gina Wilson, Organisation Intersex International Australia, *Committee Hansard*, 3 May 2012, p. 56.

99 See Australian Catholic Bishops Conference, *Submission 234*, p. 5; Australian Marriage Forum, *Submission 199*, p. 5; Presbyterian Church of Victoria (Church and Nation Committee), *Submission 117*, p. 14; Mr Chris Meney, Australian Catholic Bishops Conference, *Committee Hansard*, 3 May 2012, p. 33.

100 *Submission 117*, p. 14.

101 *Submission 153*, p. 4 (emphasis in original).

102 *Submission 199*, p. 5.

Children need both a biological mother and a biological father

2.75 The committee heard arguments from opponents of Senator Hanson-Young's Bill regarding the potential impact of marriage equality on children. The principal argument raised was that children with married, biological parents 'do best', and that legislating for marriage equality would create a new family model which removes the rights of children to be raised by their biological parents.[103] As Professor Tom Frame highlighted in evidence:

> My point is that both men and women are necessary. Societies like ours and even some quite different to ours have said that men and women play an important part in the raising of children and that they have a complementary role. In wanting to bring about a policy which I think could solidify the alienation of a child from those people, we should not countenance that as a matter of public policy.[104]

2.76 Supporters of marriage equality rejected the notion that children with parents of the same sex fare worse than children raised by a man and a woman.[105] Australian Marriage Equality noted that a significant percentage of same-sex couples in Australia are already raising children,[106] and argued that introducing marriage equality will have a positive impact on the children of same-sex couples who marry.[107] The Australian Psychological Society agreed, stating that 'there is no scientific basis for an assertion that lesbian, gay, bisexual and transgender persons are less fit to...become parents of healthy and well-adjusted children than heterosexual people'.[108] Mr Ben Callegari, representing Psychologists for Marriage Equality, informed the committee that outcomes for children are 'more to do with having two parents...not in the gender or...sexuality per se'.[109]

2.77 It is worth noting that both sides of the debate contested the research findings which support the opposing view in relation to the issue of parenting. The Australian Christian Lobby submitted that studies which assert that there is no difference between same-sex parenting and opposite-sex parenting 'have been

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103 Australian Christian Lobby, *Submission 147*, p. 6. See also: Family Council of Victoria, *Submission 63*, p. 3; Professor Margaret Somerville, *Submission 65*, pp 6-7; Australian Marriage Forum, *Submission 199*, p. 2.

104 *Committee Hansard*, 4 May 2012, p. 43.

105 See, for example, Australian Marriage Equality, *Submission 260*, p. 63; Psychologists for Marriage Equality, *Submission 201*, p. 6; Australian Psychological Society, *Submission 261*, p. 10.

106 Studies cited by Australian Marriage Equality suggest approximately 15-20 per cent of lesbian couples in Australia have children: *Submission 260*, p. 62.

107 Australian Marriage Equality, *Submission 260*, pp 35-36. See also: Rainbow Families Queensland, *Submission 200*, p. 1; Professor M.V. Lee Badgett, *Submission 293*, p. 3.

108 *Submission 261*, p. 10. See also: Psychologists for Marriage Equality, *Submission 201*, pp 5-6.

109 *Committee Hansard*, 4 May 2012, p. 49.

criticised as having serious methodological flaws'.[110] Conversely, Australian Marriage Equality claimed that studies which have been cited by opponents of marriage equality to argue that same-sex parenting do not provide a healthy environment in which to raise children are 'either deeply flawed methodologically, or...never purported to make the sort of claims that anti-marriage equality activists have attributed to them'.[111]

Marriage Act is not discriminatory

2.78 Those opposed to Senator Hanson-Young's Bill rejected the argument that denying same-sex couples the right to marry constitutes a form of discrimination.[112] For example, His Eminence Cardinal George Pell AC, Archbishop of Sydney, commented that '[u]njust discrimination against persons is always wrong, but participation in particular social institutions is not always equally available to all persons within society'.[113] Similarly, FamilyVoice Australia noted:

> Marriage law prohibits children from marrying, which could be described as 'discrimination' on the basis of age...Likewise, marriage law prohibits close relatives from marrying, which could be described as 'discrimination' on the basis of kinship...Recognition of reality is not unjust discrimination.[114]

2.79 Opponents of marriage equality often referred to the Australian Government's same-sex law reforms in 2008, arguing that those reforms removed any discrimination faced by same-sex couples and their families, and that there is no need to amend the Marriage Act to provide for marriage equality.[115] Australian Marriage Is, for example, contended:

> Following legislative reforms in [2008], there is no difference in the treatment of couples who are recognised as in a 'de facto' relationship, whether they be of the same sex or opposite sexes, and married couples.
>
> While there is no difference in the legal rights of two people in a relationship, 'marriage' must remain a term that refers to the unique relationship between a husband and wife...[116]

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110 *Submission 147*, p. 9.

111 *Submission 260*, p. 64.

112 For example, Mr Bill Muehlenberg, National Marriage Coalition, *Committee Hansard*, 4 May 2012, p. 20; Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 28; Shop, Distributive and Allied Employees' Association, *Submission 180*, pp 4-5.

113 *Submission 113*, p. 2. See also: Tasmanian Baptists, *Submission 310*, p. 4.

114 *Submission 101*, p. 2.

115 See, for example, Australian Christian Lobby, *Submission 147*, p. 35; Ambrose Centre for Religious Liberty, *Submission 156*, p. 7; Dr David van Gend, Australian Marriage Forum, *Committee Hansard*, 4 May 2012, p. 23.

116 *Submission 275*, p. 7.

2.80 Similarly, the Ambrose Centre of Religious Liberty argued:

> It is common knowledge and an established fact that the Federal Government made [amendments] to Commonwealth Legislation in [2008]. In doing so, it removed all and any differences applying between opposite sex marriages and same-sex couples in established relationships.
>
> The Federal Government did not amend the [Marriage Act] as it has consistently held that marriage is between one man and one woman.
>
> Any suggestion that same-sex couples are in any way treated differently to opposite sex couples inside or outside of marriage, other than the right to marry, is unsustainable.[117]

No 'right' to marriage at international law

2.81 Several submissions opposed to marriage equality contended that there is no evidence to support a right for same-sex couples to marry under international human rights law. Submissions frequently referred to Article 23 of the ICCPR and Article 16 of the UDHR to advance this argument.[118]

2.82 In relation to Article 23(2) of the ICCPR, the Ambrose Centre For Religious Liberty asserted:

> Item 2 of Article 23 is often referred to as being open to the meaning of any two people may marry. Such a view fails to connect the second limb of that item 2 which links marriage with founding a family...The reference to 'men and women' and to 'found a family' has an inescapable meaning that marriage is intended only for men and women marrying each other.[119]

2.83 The Australian Christian Lobby commented on the use of the phrase 'men and women' in Article 23(2) of the ICCPR:

> Elsewhere, the [ICCPR] refers to 'persons' *without* making the distinction between male and female. This indicates the importance of gender in marriage. At the very least, it indicates that same-sex marriage is not a fundamental human right recognised in international law.[120]

2.84 The Australian Christian Lobby also focused on the wording of Article 23(1) of the ICCPR, arguing that the references to the 'natural' and 'fundamental' group

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117 *Submission 156*, p. 7.

118 See, for example, FamilyVoice Australia, *Submission 101*, pp 17-18; Australian Christian Lobby, *Submission 147*, p. 34; Australian Family Association, *Submission 153*, p. 3; Ambrose Centre for Religious Liberty, *Submission 156*, p. 4; Presbyterian Church of Australia, *Submission 228*, pp 5-6.

119 *Submission 156*, p. 4; Mr Rocco Mimmo, Ambrose Centre for Religious Liberty, *Committee Hansard*, 3 May 2012, pp 28-29. See also, Lawyers for the Preservation of the Definition of Marriage, *Submission 262*, pp 14-15, in relation to Article 16(1) of the UDHR.

120 *Submission 147*, p. 34 (emphasis in original).

would 'only [make] sense in the context of heterosexual marriage, as nature requires an opposite-sex union for procreation to occur'.[121]

2.85 Submissions opposing marriage equality referred to decisions of the UNHCR and the European Court of Human Rights where the issue of the right to same-sex couples to marry has previously been considered, and determined in the negative.[122]

Is marriage equality a 'slippery-slope'?

2.86 An argument advanced by some of those opposing Senator Hanson-Young's Bill was that it will lead to a 'slippery slope' of legal recognition of other types of relationships.[123] In particular, some submissions and witnesses suggested that people involved in polygamous and polyamorous relationships could argue, on the basis of equality and non-discrimination, for further amendments to the Marriage Act to be made to recognise their relationships with multiple partners.[124]

2.87 Strong counter-arguments were made during the inquiry as to why amending the Marriage Act to provide for marriage equality for same-sex couples would *not* lead to recognition in Australia of other relationships – such as polygamous or polyamorous relationships – as marriage. For example, Pastor Michael Hercock, of Imagine Surry Hills Baptist Church, noted that the argument for equality has boundaries, specifically in relation to fidelity and monogamy:

> A commitment to monogamy and fidelity is the basis of marriage and the institution that we want as family...[M]onogamy and fidelity can exist in same-sex relationships; that [is] what we argue. We are making the point that monogamy and fidelity can exist inside any family unit, be progressive and good for the children, and good for the community that they live in. The argument...about equality across a broader spectrum—we are not arguing for that. We are asking for those individuals who want monogamy and fidelity in their lives for their families.[125]

2.88 Australian Marriage Equality also indicated that there are legal, social and cultural limits to extending marriage equality to polygamous and polyamorous

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121 *Submission 147*, p. 34.

122 See Australian Christian Lobby, *Submission 147*, p. 34, referring to the UN Human Rights Committee in *Joslin v New Zealand*, (2002) UN Doc CCPR/C/75/D/902/1999; Ambrose Centre for Religious Liberty, *Submission 156*, pp 5-6.

123 Australian Christian Lobby, *Submission 147*, p. 30; FamilyVoice Australia, *Submission 101*, p. 3; National Marriage Coalition, *Submission 134*¸ pp 26-27; Australian Marriage Forum, *Submission 199*, pp 3-4; Australian Catholic Bishops Conference, *Submission 234*, pp 7-8;

124 Family Council of Victoria, *Submission 63*, p. 3; National Marriage Coalition, *Submission 134*, pp 26-32; Australian Marriage Forum, *Submission 199*, pp 3-4; Mr Bill Muehlenberg, National Marriage Coalition, *Committee Hansard*, 4 May 2012, p. 18; Mr Jim Wallace AM, Australian Christian Lobby, *Committee Hansard*, 4 May 2012, p. 24.

125 *Committee Hansard*, 3 May 2012, p. 48.

relationships.[126] As an additional point, Australian Marriage Equality emphasised that marriage for same-sex couples is a 'natural stopping point' for marriage reform:

> [S]ame-sex attracted people remain the last class of people excluded from marriage on the basis of an immutable characteristic. Currently, same-sex couples don't have the option to marry, and there is nothing they can do to earn that right. But when same-sex marriage is eventually legalised, there will be no class of citizens left who are expressly prohibited from marrying because of something about themselves they cannot change.[127]

126 *Submission 260*, pp 70-74.

127 *Submission 260*, p. 73.

CHAPTER 3

Key issues relating to the bill and its constitutional validity

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

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

Constitutional validity of the bill

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

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

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

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

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

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

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

Interpreting the marriage power

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

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

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

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

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

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

5 *Submission 61*, p. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

11 (1999) 198 CLR 511 at 533.

12 (2003) 30 Fam LR 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Referendum on section 51(xxi)

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

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

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

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

22 *Submission 262*, p. 15.

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

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

3.18 Professor John Williams rejected this view:

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

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

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

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

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

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

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

25 *Submission 151*, p. 10.

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

Inclusion of intersex and transgender persons

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

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

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

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

Refining the bill's definition

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

'A union of two people'

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

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

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27 *Submission 198*, p. 3.

28 *Submission 173*, p. 4.

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

30 *Submission 137*, p. 11.

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

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

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

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

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

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

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

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

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31 *Submission 193*, p. 5.

32 *Submission 178*, pp 10-11.

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

34 *Submission 260*, p. 91.

35 *Submission 189*, p. 7.

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

37 *Submission 61*, p. 2.

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

Protections for ministers of religion

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

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

Are current protections in section 47 adequate?

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

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

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

39 Subparagraph 47(a) of the Marriage Act.

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

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

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

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

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

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

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

Inclusion of further protections in legislation providing for marriage equality

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

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42 *Submission 166*, p. 5.

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

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

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

46 *Submission 147*, p. 14.

47 *Submission 260*, p. 91.

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

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

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

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

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

Recognition in Australia of marriages conducted overseas

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

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

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

49 *Submission 61*, p. 6.

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

51 See the Hon Nicola Roxon MP, Attorney-General, *Certificates of No Impediment to marriage for same-sex couples*, media release, 27 January 2012, available at http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/27-January-2012---Certificates-of-No-Impediment-to-marriage-for-same-sex-couples.aspx (accessed 14 May 2012).

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

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

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

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

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

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

53 See the Hon Nicola Roxon MP, Attorney-General, *Certificates of No Impediment to marriage for same-sex couples*, media release, 27 January 2012, available at: http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/27-January-2012---Certificates-of-No-Impediment-to-marriage-for-same-sex-couples.aspx (accessed 14 May 2012).

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

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

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

57 *Submission 137*, pp 8-9.

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

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

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

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

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

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

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

60 *Submission 169*, p. 15.

CHAPTER 4

Committee view and recommendations

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

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

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

Marriage equality is about rights and removal of discrimination

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

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

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

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

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

Marriage is a secular institution

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

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

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

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

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

2 *Submission 72*, p. 1.

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

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

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

Evolution of marriage in modern society

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

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

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

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

5 *Submission 64*, p. 1.

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

Impact of marriage equality on children

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

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

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

4.17 The American Psychological Association has also made similar findings:

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

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

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

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

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

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

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

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

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

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

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

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

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

11 *Submission 200*, pp 3-4.

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

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

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

Public support for marriage equality

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

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

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

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

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

Conscience vote on marriage equality legislation

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

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

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

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

Specific commentary on Marriage Equality Amendment Bill 2010

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

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

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

Constitutionality validity

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

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

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

Definition of 'marriage' in the bill

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

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

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

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

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

Protections for ministers of religion

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

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

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

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

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

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

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Senator Trish Crossin

Chair

ADDITIONAL COMMENTS BY SENATOR BIRMINGHAM AND SENATOR BOYCE

1.1 We support the direction of the findings of the majority report of the inquiry into the Marriage Equality Amendment Bill 2010 and the intentions underlying its recommendations. These comments are intended to add to the issues already canvassed in that report.

Why do we have a Marriage Act?

1.2 This is a threshold question that is generally overlooked in this debate. Several submissions called for laws regarding marriage to be repealed and for marriage to instead be a private contract between two people, including that made by Mr Trevar Chilver:

> Marriage is a relationship between individuals, and not a relationship between individuals and their government. It is my opinion generally that every law regulating marriage in Australia should be repealed, not that any more should be introduced.[1]

1.3 This is a theme expanded upon by the Hon Dr Peter Phelps MLC in his speech during the recent New South Wales Legislative Council debate on same-sex marriage. Dr Phelps stated:

> Privatisation of marriage would allow people to marry the way they want to: individually, privately, contractually, with whatever ceremony they might choose in the presence of family, friends, or God. Under a privatised system of marriage, courts and government agencies would recognise any couple's contract—or, better yet, eliminate whatever government-created distinction turned on whether a person was married or not.
>
> Marriage is an important institution. But the modern mistake is to think that important things must be planned, sponsored, reviewed, or licensed by the government.[2]

1.4 Such views recognise important principles such as small government, individual freedom and personal responsibility. Above all else they recognise that

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1 Mr Trevar Chilver, *Submission 130*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=43be7067-3145-494a-a6c3-9af7a66ffce0.

2 The Hon Dr Peter Phelps MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102: http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

marriage existed long before there were statutory definitions of it and that, at its heart, marriage is a personal commitment between two people.

1.5 The first Act to define marriage in a civil statute occurred in England in 1754. The driving forces of this intervention by the state in these personal contracts between two people were identified in Dr Phelps' speech, who indicated they were the 'culmination of a long struggle the courts had with the evidentiary proof of marriage; which itself was only really a problem when allegations of bigamy and/or divorce proceedings arose'.[3]

1.6 It was the dissolution of marriage that drove state intervention in marriage rather than its creation. Today, that remains an important factor in the need for some regulation, along with various recognitions afforded to married couples across our legal system. Although many of these recognitions and procedures to resolve the dissolution of a relationship are also afforded to de-facto couples, the clearest way to establish eligibility is through marriage.

1.7 It is worth remembering that there are several distinct roles the act of getting married plays, not all of which are applicable to all marriages. These include:

i. a public declaration and celebration of love between two people;
ii. a commitment made before God or in accordance with religious beliefs; and
iii. a legal agreement entered into in accordance with the laws of Australia.

1.8 The first of these roles involves a decision that is intensely personal and maintains the likeness of a private contract between two people. The second of these is also a personal matter between the two people getting married and their church or religious institution. In a free and secular society like Australia, the role this second factor plays should be respected and protected by our laws, but not dictate how our laws are shaped.

1.9 The last of these roles is the only role the state or the parliament should deal with. It is not the role of the Marriage Act to regulate love. Nor is it the role of the Marriage Act to regulate religion. It is for the Marriage Act to set the terms for a legal agreement between two people.

The civil institution of marriage

1.10 The terms for this legal agreement that constitutes the civil institution of marriage have evolved with the views of society. The Hawkesbury Nepean Community Legal Centre stated in their submission that:

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3 The Hon Dr Peter Phelps MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102: http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

> The rules governing marriage have evolved significantly over the years. For example, wives are no longer treated as the property of their husbands, we now prohibit rape in marriage, we allow interracial couples to marry and we allow and recognise divorce.[4]

1.11 As a civil legal institution marriage is regulated by the Marriage Act and is subject to amendment by Parliament. It is our opinion (formed not just by opinion polls or numbers of submissions received, but through many conversations across the community) that the views of modern Australian society towards same-sex marriages are evolving. Acceptance is growing, with seemingly increasing community support for same-sex marriages to be accommodated within the Marriage Act.

1.12 The Hawkesbury Nepean Community Legal Centre also highlighted that the civil institution of marriage is distinct from the religious institution of marriage:

> While marriage takes various forms across many different cultures and has assorted religious histories attached to it, marriages performed by the State are civil, not religious, in nature. It is imperative that religious interests are not privileged over the right of all citizens to non-discrimination and to be treated equally under the law.[5]

1.13 This point is important, as many of the arguments made to the inquiry against allowing same-sex marriage were based on religious teachings or beliefs about the religious institution of marriage, not the civil institution of marriage.

1.14 It must be recognised and respected that for many Australians marriage has a special religious meaning. For many, the terms of entering into a marriage and dissolving a marriage are governed as much, if not more so, by the rules and beliefs of their church. Their rights should not be infringed by our civil laws and The Very Reverend Dr Peter Catt of Saint John's Cathedral makes clear that the Marriage Equality Amendment Bill 2010 does not do so:

> My understanding is that The Marriage Act will continue to enable the conduct of both civil ceremonies and those conducted by ministers of religion. I therefore commend the fact that the proposed legislation will not

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4 Hawkesbury Nepean Community Legal Centre, *Submission 148*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bf2e826d-36eb-4e8e-ab73-553905db8fb3.

5 Hawkesbury Nepean Community Legal Centre, *Submission 148*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bf2e826d-36eb-4e8e-ab73-553905db8fb3.

> affect the right of churches or other religious groups to celebrate marriage according to their own understanding and religious beliefs.[6]

1.15 It is important to be crystal clear on this point. No religion or minister of religion should be expected to conduct or recognise a marriage that is not in accordance with their teachings and faith, including same-sex marriages. As the majority report makes clear, any change to our marriage laws must protect these religious freedoms.

1.16 However, these issues do highlight a blurring that sometimes occurs between community understanding of the civil institution of marriage, as distinct from the religious institution of marriage. We believe there would be some merit in renaming the Marriage Act as the Civil Marriages Act and drawing a sharper distinction in both the legislation and, hopefully, the public consciousness between the civil institution of marriage and the religious institution of marriage.

Strengthening the institution of marriage

1.17 Although the issues canvassed to date focus on the legal reasons for having marriage laws, their limited role compared to the importance of the personal contract between the marrying parties and their different nature compared to a religious marriage, there is also a societal benefit to marriage that would appear to warrant facilitating as many people as possible being able to make this commitment to each other.

1.18 It is often said that the best form of social security is the family. By affording same-sex couples the right to marry we will be strengthening the ties not just of their relationships but across their respective families, which benefits not just those family members but society as a whole.

1.19 In its submission to the inquiry, Australian Marriage Equality highlighted an editorial in a 1996 edition of *The Economist*, which argued that:

> Marriage remains an economic bulwark. Single people…are economically vulnerable, and much more likely to fall into the arms of the welfare state. Furthermore, they call sooner upon public support when they need care—and, indeed, are likelier to fall ill (married people, the numbers show, are not only happier but considerably healthier). Not least important, marriage is a great social stabiliser of men.[7]

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6 The Very Reverend Dr Peter Catt, *Submission 72*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a1a9711b-5b0d-4d0c-b236-f58e7139003b.

7 The Economist, 'Let them wed', 4 Jan 1996: http://www.economist.com/node/2515389/print?Story_ID=2515389.

1.20 Marriage by its very nature creates interdependence. With interdependence couples are more likely to rely on each other, as well as the extended families of their partners, than they are to rely on the state. Strengthening societal support structures and reducing potential reliance on government may be key benefits of providing equal access to marriage for same-sex couples.

1.21 It is also claimed that married couples are healthier and happier. Thus, there is a potential social good to be achieved in same-sex couples benefiting from the love and support marriage provides.

1.22 British Prime Minister David Cameron made similar points when declaring his support for marriage equality and committing to lead his Conservative Government to legislate in favour of allowing same-sex marriage:

> I stood before a Conservative Conference once and I said it shouldn't matter whether a commitment is between a man and a woman or a man and a man, or a woman and a woman – and you applauded me. Five years on we are consulting on legalising gay marriage, and to anyone who has any reservations I say this: it's about equality. But it's also about something else: commitment. Conservatives believe in the ties that bind us; that society's stronger when we make vows to each other and support each other. So I don't support gay marriage in spite of being a Conservative, I support gay marriage because I am a Conservative.[8]

1.23 Contrary to submissions claiming that same-sex marriage would undermine marriage we believe that the opposite is likely to be true. The nature of one couple's marriage should have no bearing on the nature of another couple's marriage. Underlying each set of vows is a unique relationship that will succeed or fail regardless of whom else does or does not get married.

1.24 However, discrimination does divide us as a society. Current marriage laws treat loving, long-term relationships between two heterosexual persons differently from loving, long-term relationships between two homosexual persons. So-called compromises like civil unions would still divide, by creating two classes of relationship, one or both of which are prohibited to some couples in our society.

1.25 Evidence from Scandinavia suggests that where same-sex marriage is legalised there has also been an increase in heterosexual marriage, suggesting marriage as an institution benefits from equality as an increasingly recognised element of discrimination is removed. It is noted in the majority report and numerous submissions that the discriminatory constraints imposed by the Marriage Act are increasingly being objected to by heterosexual couples contemplating or undertaking marriage.

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8 Prime Minister David Cameron, Speech to the Conservative Party Conference, 5 October 2011: http://www.telegraph.co.uk/news/politics/conservative/8808521/Conservative-Party-conference-2011-David-Camerons-speech-in-full.html.

1.26 Some have argued that creating equality for heterosexual and homosexual couples under marriage laws discriminates against others, especially those in polygamous relationships. This argument is well refuted by the submission of Mr Tim Wilson:

> Polygamous relationships are relationships of choice. Homosexuality is not. I doubt any member of this committee would dispute that there is a natural desire for one person to build a relationship with another person, whether heterosexual or homosexual.[9]

1.27 Ultimately, the fact that same-sex couples want to be able to marry shows their commitment to upholding and strengthening this institution and its foundations of love, commitment, responsibility, monogamy and stability.

A matter of conscience

1.28 After many years of debate about the position of their platform on the issue of same-sex marriage, the Labor Party changed its stance late last year and accorded its Members and Senators a conscience vote on the matter. These changes take time and, though mindful of the honourable desire of the Leader of the Opposition to keep the commitment he made on this issue at the last election, we hope that in time the Liberal Party will also allow a conscience or free vote on the subject of same-sex marriage for its Members and Senators.

1.29 Opinion polls, inquiry submissions, electorate office correspondence and views expressed to us in day-to-day conversations all indicate that opinion on same-sex marriage is divided amongst both Labor voters and Liberal voters. It would follow that it would be divided amongst their representatives too, as evidenced by the public support for same-sex marriage from prominent Liberals like former Premiers Jeff Kennett[10] and Nick Greiner,[11] as well as current state Liberal leaders Campbell Newman[12] and Isobel Redmond.[13]

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9 Mr Tim Wilson, *Submission 359*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=89cd874c-084b-4669-aaaf-902efbc03873.

10 The Hon Jeff Kennett, 3AW, 8 March 2012: http://www.3aw.com.au/blogs/neil-mitchell-blog/jeff-kennett-on-gay-marriage/20120308-1uls6.html.

11 The Hon Nick Greiner, *SMH*, 13 April 2011: http://www.smh.com.au/national/greiner-dismisses-samesex-marriage-concerns-20110412-1dcmh.html.

12 The Hon Campbell Newman, *Brisbane Times*, 17 April 2011: http://www.brisbanetimes.com.au/queensland/newman-backs-gay-marriage--but-forget-about-law-changes-20110417-1djbk.html?from=smh_ft.

13 The Hon Isobel Redmond MP, ninemsn, 10 October 2011: http://news.ninemsn.com.au/national/8357777/sa-liberal-leader-supports-gay-marriage.

1.30 Having been granted a conscience vote by their leader Barry O'Farrell, four Liberal Party Legislative Councillors joined with two National Party Legislative Councillors to support a recent motion in the New South Wales Legislative Council calling for amendments to the Marriage Act that would facilitate same-sex marriage.

1.31 However, the existence of divided opinion alone is not sufficient to warrant a conscience vote. But the fact that individual views on this matter are almost entirely informed by moral, ethical and religious values, from which people within different political parties reach differing conclusions, does make it an obvious area for a conscience vote. The personal nature of the thinking that should go into a parliamentarian forming an opinion on this matter was well addressed by New South Wales Nationals Legislative Councillor, the Hon Sarah Mitchell, in her speech to the aforementioned debate in the NSW Parliament:

> This is the third conscience vote that I will have participated in since becoming a member of this House. All three matters have been challenging and have required me to make considered and personal decisions. While it may sound simplistic, I reached my decisions on the previous conscience votes based on what I thought in my head and what I felt in my heart. My decision on the motion before the House is made on the same basis.[14]

1.32 We also note that the Liberal Party has a strong tradition of providing greater freedoms to its representatives than does the Labor Party. Not only are Liberals free of Labor's binding pledge and able to cross the floor on matters without facing expulsion from our Party, but on substantive policy matters Liberals have always operated with a free or conscience vote where their Labor counterparts have and, indeed, have afforded such freedoms to the representatives on several occasions where Labor did not. These are traditions that should be valued.

Conclusion

1.33 Finally, we will briefly address two further matters before concluding on the substantive issue.

1.34 Same-sex marriages are now performed in many countries, including South Africa, Argentina and Spain. Many Australians have wed overseas and returned home to find that a ceremony recognised overseas is not recognised in their home country. For the love and commitment of some Australians to be recognised by a foreign government but not their own is something we should avoid. As Mr Wilson said regarding the mutual obligation between citizens and their governments in his submission:

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14 The Hon Sarah Mitchell MLC, Speech on Marriage Equality motion, NSW Legislative Council, 24 May 2102: http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20120524022?open&refNavID=HA3_1.

> If same-sex couples are expected, for the purposes of the law, to pay the same tax rates and carry the same civil obligations as married couples, then basic civil rights should correlate with those responsibilities.[15]

1.35 Civil unions or similar arrangements can now be registered in different ways in different Australian states and territories. For administrative simplicity, legal simplicity and cost reduction it makes no sense to have different schemes operating across Australia. Such a situation results in Australian same-sex couples having different recognition and rights, or none, depending on which state they live in or choose to move to, while heterosexual marriages are recognised uniformly across Australia. These approaches, while well intentioned, are simply adding new layers of discrimination when the simple solution of marriage equality would provide a far easier and better outcome.

1.36 For all of the arguments that may be made about marriage and this issue, there remains the simple fact that under our civil laws this intensely personal commitment made between two people, for which there is no comparable alternative available, excludes some in our society. As former Liberal Senator Christopher Puplick AM and Mr Larry Galbraith put it in their comprehensive submission:

> Marriage is the only form of legally recognised relationship in which the partners are required to explicitly acknowledge that they are mutually committed to each other as faithful life partners. No other legally recognised relationship provides the same public recognition or guarantees of certainty and security. This significant difference points to the one serious remaining inequality. Heterosexual couples have the option of marrying. Homosexual couples do not.[16]

1.37 This situation is neither fair nor equitable. In our opinion, as recommended by the majority report, this inequity warrants change.

Senator Simon Birmingham
Senator for South Australia

Senator Sue Boyce
Senator for Queensland

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15 Mr Tim Wilson, *Submission 359*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill: https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=89cd874c-084b-4669-aaaf-902efbc03873.

16 Mr Christopher Puplick AM and Mr Larry Galbraith, *Submission 193*, Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Marriage Equality Amendment Bill. https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=3dbb69ca-8590-4b5d-8611-d9c363b1e65e.

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.

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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

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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

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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.

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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).

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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.

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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.

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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.

DISSENTING REPORT BY INDIVIDUAL LABOR SENATORS

1.1 The Marriage Equality Amendment Bill introduced by Australian Greens Senator Sarah Hanson-Young seeks to amend the current definition of marriage in the *Marriage Act 1961* (Cth) (Marriage Act) from 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' to 'the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life'.

1.2 Senator Hanson-Young, in her second reading speech, stated that the purpose of the bill is to 'provide equality for same sex couples – (by removing) discrimination under the Marriage Act so that while marriage is still a union between two consenting adults, it is not defined by gender.

1.3 The debate over same-sex marriage is about the function and purpose of the law in relation to marriage and not a discussion that goes to personal motivation and attitudes. We believe every member of our society deserves to be treated fairly regardless of their sexual orientation. It is significant however, that in the campaigns developed around the proposed legislation, the issue has been debated through the prism of fairness and justice. However, there are many deeper issues that motivate our disagreement with the proposition of same-sex marriage.

1.4 The main claim in favour of changing the law is that the current law unfairly singles out people with same-sex attraction by not allowing them to have the same status as people who are married. It is important to note that Australian law has already been changed to give same-sex partners the same legal rights as those who are married and in an increasing number of states to register their unions. The remaining issue therefore is the definition of marriage.

1.5 It is our view that the issue is one of definition, not discrimination. The Federal Parliament removed all inequalities in law and provided appropriate protections regarding property issues for all relationships in 2008 when more than eighty pieces of legislation were amended, with bi-partisan support.

1.6 In our view, changing the law so that marriage includes same-sex unions would be a change to what marriage means. Currently marriage involves a comprehensive union between a man and a woman. Marriage has a place in the law because a relationship between a man and a woman is the kind of relationship that may produce children. Marriage is linked to children, for the sake of children, protecting their identity. It is worthy to note that in California after their legislature experimented with same-sex marriage, the people of California voted against the revisionist concept of marriage.

1.7 Whilst the majority report makes four recommendations supporting the passage of the Bill, we wish to report our concerns about the report and disagreement with all four recommendations.

1.8 It is disappointing that the report has selectively reported on submissions which support the majority view, discounting contrary viewpoints expressed by individuals, organisation, religious and academic institutions.

1.9 We acknowledge that men and women are free to enter into whatever relationships they desire, as long as in doing so they do not endanger others, under law, or in any way demean other relationships. However, we argue that marriage as it is currently defined under the law reflects the wider societal view of that relationship as being between a man and a woman.

1.10 We do not take as a genuine claim, the suggestion that same-sex marriage is a fundamental human right. The European Court of Human Rights has in the past three years twice stated that there is no human right for same-sex marriage. We concur with the view by Australian human rights lawyer, Father Frank Brennan AO, former Chairman of the National Human Rights Consultative Committee, and an expert on discrimination who has written:

> Instead of stating 'All persons have the right to marry', the International Covenant on Civil and Political Rights provides: 'The right of men and women of marriageable age to marry and to found a family shall be recognised.' The Covenant asserts: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'
>
> I believe our parliamentarians should maintain this distinction, for the good of future children, while ensuring equal treatment for same sex couples through the legal recognition of civil unions.
>
> In considering whether to advocate a change to the definition of marriage, citizens need to consider not only the right of same sex couples to equality but even more so the rights of future children.
>
> The State has an interest in privileging group units in society which are likely to enhance the prospects that future children will continue to be born with a known biological father and a known biological mother who in the best of circumstances will be able to nurture and educate them.
>
> That is why there is a relevant distinction to draw between a commitment between a same sex couple to establish a group unit in society and a commitment of a man and a woman to marry and found a family.
>
> I think we can ensure non-discrimination against same sex couples while at the same time maintaining a commitment to children of future generations being born of and being reared by a father and a mother. To date, international human rights law has appreciated this rational distinction.[1]

1 Father Frank Brennan, 'The perils of redefining marriage', *Eureka Street*, 24 November 2010.

1.11 We reject the notion that the Marriage Act as it currently stands discriminates against those who choose same-sex relationships and maintain that the Marriage Act has as its primary purpose the protection and wellbeing of children.

1.12 As members of the Australian Labor Party, we support the principle of a conscience vote on matters of deep social and moral issues.

1.13 In December 2011, the Labor Party National Conference endorsed a position to allow Senators and Members of the Federal Parliament the ability for a conscience vote in respect to same-sex marriage. Labor parliamentarians are at liberty to vote in accordance with their conscience in respect to same-sex marriage should the matter come before the parliament.

1.14 The decision for a conscience vote at the Labor National Conference was taken after robust and extended debate both at the National Conference and at other fora of the Labor Party. The decision to extend a conscience vote on same-sex marriage only applies to the Labor Party. The Labor Party does not have a history of interfering in the machinery and operational methods which other political parties may wish to exercise.

1.15 We therefore find it inappropriate and improper that a Senate committee which itself is representative of all political parties in the Federal Parliament, should seek to interfere in internal party matters and recommend a conscience vote when clearly this is a matter for each political party to decide. The recommendation is intrusive of the processes adopted by other political parties.

We reject Recommendation 1 and voice our opposition to it.

1.16 The majority committee report supports the legislation seeking to amend the Marriage Act to recognise same-sex marriage. Little consideration was given by the committee of possible abuses or unintended consequences of the legislation as drafted. For example, two neighbours may elect to marry in order to enjoy favourable taxation benefits or welfare benefits or mutual travel concessions. Two people in a relationship seeking beneficial returns on the back of marriage do nothing for society and the union renders marriage as meaningless. It merely subsumes the meaning of marriage as part of relationships generally.

1.17 There is no interest for the state in endorsing relationships between two people and, therefore, making such relationship public matters. Relationships between two or more people remain in the private realm, not in the public.

We therefore oppose Recommendation 2 which supports same-sex marriage.

1.18 The committee has made a recommendation to include an 'avoidance of doubt' clause as a concession to the religiously minded community and their churches. The 'removal of doubt' with respect to the operation of section 47 of the Marriage Act is to reinforce the view that ministers of religion will not be compelled to solemnise same-sex marriages.

1.19 While churches remain at the mercy of legislation for such protection, it does not guarantee this protection, as events in Denmark and Scotland in recent times have shown. Denmark has passed legislation to compel churches to officiate at same-sex ceremonies and Scotland is considering same-sex marriage with no church exemption. In addition to churches and ministers remaining at the mercy of the government of the day, church-run schools could be subject to anti-discrimination laws as to what they can teach on the subject of marriage.

1.20 The re-assurance which the recommendation is attempting to offer is hollow and tactical in nature rather than a matter of substance.

We therefore oppose Recommendation 3.

1.21 The final recommendation of the majority report is to support the Bill and pass it into law.

1.22 Throughout the debate on this legislation there has been assertion that there is discrimination against sexual orientation and gender identity. In fact most states have discrimination laws stating these attributes are protected. Opposing same-sex marriage is not an exercise in discrimination nor is it a hurtful belief. If people have genuine beliefs as to what marriage is and its role in the regeneration of society, then people holding these beliefs should not be subject to accusations of discrimination and homophobia.

We therefore oppose Recommendation 4 and reiterate our opposition to this Bill and the committee's recommendations.

Senator Mark Furner
Senator for Queensland

Senator the Hon Ursula Stephens
Senator for New South Wales

Senator Helen Polley
Senator for Tasmania

Senator Alex Gallacher
Senator for South Australia

Senator Catryna Bilyk
Senator for Tasmania

Senator Mark Bishop
Senator for Western Australia

Senator Glenn Sterle
Senator for Western Australia

APPENDIX 1

TABLE SUMMARISING PROPOSED MARRIAGE EQUALITY LEGISLATION[1]

	Marriage Equality Amendment Bill 2010 (Hanson-Young Bill)	**Marriage Equality Amendment Bill 2012** (Bandt/Wilkie Bill)	**Marriage Amendment Bill 2012** (Jones Bill)
Definition of 'marriage' (subsection 5(1))	Repeal the definition, substitute: ***marriage*** means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life. (cl 1)	Repeal the definition, substitute: ***marriage*** means the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life. (cl 1)	Repeal the definition, substitute: ***marriage*** means the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life. (cl 1)
Subsection 45(2)	After "*or* husband", insert ", *or* partner". (cl 2)	After "*or* husband", insert ", *or* partner". (cl 2)	
Subsection 46(1)	Omit "a man and a woman", substitute "two people". (cl 3)	Omit "a man and a woman", substitute "two people". (cl 3)	Omit "a man and a woman", substitute "two people". (cl 2)
Section 47		After "Part", insert "or in any other law". (cl 4) To avoid doubt, the amendments made by this Schedule do not limit the effect of section 47 (ministers of religion not bound to solemnise marriage etc.) of the Marriage Act 1961. (cl 8)	After paragraph (a), insert: (aa) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise a marriage where the parties to the marriage are of the same sex; or (cl 3)
Subsection 72(2)	After "*or* husband", insert ", *or* partner". (cl 4)	After "*or* husband", insert ", *or* partner". (cl 5)	
Section 88EA	Repeal the section. (cl 5)	Repeal the section (cl 6)	Repealed (cl 4)
Part III of the Schedule (table item 1)		Omit "a husband and wife", substitute "two people". (cl 7)	Omit "a husband and wife", substitute "two people". (cl 5)
Consequential amendments		(1) The Governor-General may make regulations amending Acts (other than the *Marriage Act 1961*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act. (2) For the purposes of the *Amendments Incorporation Act 1905*, amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act. (cl 9)	

1 Source: Lawyers and academics from Deakin University School of Law, *Submission 189*, p. 9.

APPENDIX 2

SUBMISSIONS PUBLISHED ON THE COMMITTEE'S WEBSITE

Submission Number	Submitter
1	The Life Centre
2	Rainbow Tasmania Committee
3	Parents and Friends of Lesbians and Gays
4	Ms Emily McCosker
5	Mr David Allan
6	Mr Daniel Nguyen
7	Mr Paul Myers
8	Mr Tony Thomas
9	Mr Neil Foster
10	Mr James Gall
11	Name Withheld
12	Name Withheld
13	Miss Keely Gordon-King
14	Mr Doug Pollard
15	Ms Rachel Whiting
16	Mr Allan Weatherall
17	Name Withheld
18	Ms Sarah de Rooy and Ms Lee Dunbar
19	Ms Kristy Adams

20	Name Withheld
21	Name Withheld
22	Name Withheld
23	Name Withheld
24	Mr Michael O'Halloran
25	Mr Anthony Venn-Brown, Ambassadors and Bridge Builders International
26	Mr Brent Melville
27	Mr Robert and Mrs Marjorie Carter
28	Mr Jeffrey Hughes
29	Mr Giovanni Portelli
30	Mr Warwick Poole
31	W P Gadsby
32	Mr Peter Butler
33	Mrs Shelley Argent OAM
34	Mr Geoffrey Rees
35	Name Withheld
36	Mr Beau Hawton
37	Mr Walter Peter
38	Mr Clive Buultjens
39	Dr William Watson
40	Mr Mike Flynn
41	Ms Helene Cohen
42	Name Withheld

43	Pastor Lynton Taylor
44	Ms Helen Kaplick
45	Professor Ben Saul, Sydney Centre for International Law, University of Sydney
46	Mr David Dick
47	Mr John Mikelsons
48	Mr Tom Morley
49	Mr Martin Clarke
50	Mr Benjamin Heathwood
51	Mrs Grace Tse
52	Reverend Martin Rosenberg
53	Dr Sally Kannar
54	Mr Colin Dunn
55	Mr Don Willis
56	Mr John Rietveld
57	Mr Rodney Croome AM
58	Amnesty International Australia
59	The Humanist Society of Victoria
60	Mr Graham Phillips and Mrs Carol Phillips
61	Gilbert and Tobin Centre of Public Law
62	Mr Geoffrey Lapthorne
63	Family Council of Victoria
64	Mr Brian Greig OAM
65	Professor Margaret Somerville AM

66	Mr Michael McDougall
67	Mr Craig Parkin
68	Endeavour Forum
69	Pastor Neil Hart
70	Pastor Andrew Heard, Lead Pastor EV Church
71	Mr Alan Anderson
72	The Very Reverend Dr Peter Catt, Dean of Saint John's Cathedral
73	Name Withheld
74	The Hon Michael Kirby AC CMG
75	The Union for Progressive Judaism
76	Lutheran Church of Australia
77	Let's Get Equal Campaign
78	Mr Christopher McNicol
79	Mr Gary and Mrs Melissa Edmonds
80	Reverend Michael Blake, Narellan Anglican Parish
81	Mr Andrew Goff
82	Mr Geoff Allshorn
83	Ms Rachel Dennis
84	Name Withheld
85	Ms Jan Easter
86	Presbyterian Women's Association of Australia in New South Wales
87	Mr Spencer Gear
88	Mr Christopher Marshall

89	Mr Raymond Morris
90	Name Withheld
91	Reverend Dr Margaret Court AO MBE
92	Mr Nathan Thomas
93	Mr Roger Sawkins
94	Reverend Eileen Ray
95	Mr Ben Mee
96	Mr Martin Feckie
97	Mr Angus McGruther
98	The Hon Kristina Keneally MP
99	Mr Ben Parry
100	Dr Robert Pollnitz
101	FamilyVoice Australia
102	Reformed Church of Box Hill
103	Drug Policy Modelling Program
104	ACT Branch of the Australian Family Association
105	Presbyterian Church of Queensland
106	Episcopal Assembly of Oceania
107	Geelong Adolescent Sexuality Project
108	Women's Law Centre of Western Australia
109	New South Wales Gay and Lesbian Rights Lobby
110	The Hon Trevor Khan MLC
111	Ms Clover Moore MP, Lord Mayor of Sydney

112	Ms Briannon Stevens and Ms Julie Parry
113	His Eminence Cardinal George Pell AC, Archbishop of Sydney
114	Mr Bernard Hennessy
115	Ms Janine Homer
116	Australian Human Rights Commission
117	Presbyterian Church of Victoria
118	Association for Reformed Political Action
119	Rabbinical Council of New South Wales
120	Ms Chanika Desilva
121	Mr Benjamin Jones
122	Mr Paul Martin, Principal Psychologist, Centre for Human Potential
123	Dr Jane Anderson
124	Mrs Jennifer Cram
125	Mr Ken Roche
126	Ms Rita Joseph
127	Mr Martin Fitzgerald
128	Mr Peter Bond
129	Reverend Dr Garry Deverell
130	Mr Trevar Chilver
131	Christian Faith and Freedom
132	Knights of the Southern Cross Victoria
133	Australian Medical Students' Association
134	National Marriage Coalition

135	Mr Benjamin Head
136	Mr Michael Ord
137	Australian Lawyers for Human Rights
138	Public Interest Advocacy Centre
139	Saint Andrews Anglican Church, Oak Flats
140	Dr Andrew Corbett
141	Mr Graham Eggins
142	Reverend Roger Munson, Saint James Uniting Church
143	Mr Lionell Pack
144	Assembly of Confessing Congregations within the Uniting Church in Australia
145	Organisation of Rabbis of Australasia
146	Institute for Judaism and Civilization
147	Australian Christian Lobby
148	Hawkesbury Nepean Community Legal Centre
149	Council of Australian Humanist Societies
150	Focus on the Family Australia
151	University of Adelaide Law School
152	New South Wales Council for Civil Liberties
153	Australian Family Association
154	Presbytery of North Western Victoria
155	Church and Nation Committee of the Evangelical Presbyterian Church of Australia
156	Ambrose Centre For Religious Liberty

157	National LGBTI Health Alliance
158	Salt Shakers
159	Christian Democratic Party, Clarence Branch
160	Protect Marriage Australia
161	Human Rights Law Centre
162	Winning Attitudes Recruitment
163	National Civic Council
164	Parents and Friends of Lesbians and Gays ACT
165	Top End Women's Legal Service
166	Liberty Victoria
167	Pastor Wally Schiller, Light Pass Immanuel Lutheran Parish
168	Mr Dean Allright
169	Professor Kerryn Phelps OAM and Ms Jackie Stricker-Phelps
170	The Hon Lara Giddings MP, Premier of Tasmania
171	Reverend David Fisher, Moree Anglican Church
172	Mr Greg Donnelly MLC
173	Inner City Legal Centre
174	Rainbow Labor Tasmania
175	Immigration Advice and Rights Centre
176	Australian Democrats
177	ACON
178	Law Council of Australia
179	Youth Action and Policy Association New South Wales

180	Shop Distributive and Allied Employees Association
181	Bisexual Alliance Victoria
182	Australian Young Labor Western Australia
183	Dads4Kids Fatherhood Foundation
184	Ms Yvonne Henderson, Commissioner for Equal Opportunity Western Australia
185	Coral Sea Resort
186	Australian Family Association Western Australia
187	Australian TFP Bureau
188	Victorian Gay and Lesbian Rights Lobby
189	Lawyers and academics from Deakin University School of Law
190	Tasmanian Young Labor
191	Tasmanian Gay and Lesbian Rights Group
192	Name Withheld
193	Mr Christopher Puplick AM and Mr Larry Galbraith
194	Professor Patrick Parkinson AM
195	Mr Donald Ritchie
196	Anglican Diocese of Sydney, Social Issues Executive
197	headspace
198	Organisation Intersex International Australia
199	Australian Marriage Forum
200	Rainbow Families Queensland
201	Psychologists for Marriage Equality
202	Ad Hoc Interfaith Committee

203	Canberra Atheist Church
204	Paddington Uniting Church
205	United Voice ACT
206	Saint Andrew's Presbyterian Church, Gunnedah
207	Victory Life Broome
208	Catholic Women's League Australia
209	Guild of Saint Luke
210	Committee for Preservation of Marriage
211	Mr Stephan Elliott
212	Ms Fiona James
213	Reverend Narelle Oliver-Braddock
214	Ms Josephine Hutton
215	The Hon Ian Hunter MLC
216	Mr Charles Lowe
217	The Hon Don Harwin MLC
218	Mr James Newburrie
219	Ms Roberta Vaughan
220	Mr John Moore
221	Ms Helena Adeloju
222	Ms Piroska Williams
223	Mr Arthur Escamilla, Dean, Warrane College, University of New South Wales
224	The Very Reverend Richard Humphrey, Dean of Hobart
225	Mr Eric Jones

226	Mr Roger Cunningham
227	Tasmanian Greens Members of Parliament
228	Presbyterian Church of Australia
229	Doctors for the Family
230	Australian Youth Affairs Coalition
231	Rabbinical Council of Victoria
232	Australian Family Association
233	Family Life International Australia
234	Australian Catholic Bishops Conference
235	The Salvation Army Australia Southern Territory
236	Minus18
237	Association of Australian Christadelphian Ecclesias
238	Defence Lesbian, Gay, Bisexual, Transgender and Intersex Information Service
239	Women's Legal Services New South Wales
240	Catholic Women's League of Victoria and Wagga Wagga, Social Questions Committee
241	Lesbian and Gay Solidarity, Melbourne
242	Reverend Greg Smith, Metropolitan Community Church Sydney
243	Ethics and Sustainability Party
244	Australian Federation for the Family
245	Ally Network, Curtin University
246	River of Praise, Church for All Nations
247	The University of Queensland Queer Collective

248	Wesleyan Methodist Church of Australia
249	Pastor Michael Hercock, Imagine Surry Hills Baptist Church
250	Parents and Friends of Lesbians and Gays NSW
251	Reverend Dr Michael Stead, Saint James Turramurra
252	Mr Stephen Page
253	Mr Darrell Parker, Chaplain, Saint Mark's UNE Church
254	Mr Patrick Sibly
255	Mr Tom Togher
256	Mr Tom Snow
257	Mr Nigel Wittwer and Mrs Sandy Wittwer
258	Dr Ian Ridgway
259	Name Withheld
260	Australian Marriage Equality
261	Australian Psychological Society
262	Lawyers for the Preservation of the Definition of Marriage
263	Mr Jack Jones
264	Ms Carolyn Cormack
265	Name Withheld
266	Name Withheld
267	Ms Kate Frenda
268	Mr Alex Greenwich
269	Reverend Emeritus Professor William Loader
270	Reverend Jill Lienert

271	Ms Meaghan Webster
272	Mr Justin Rassi
273	Mr Matthew Waldron
274	Name Withheld
275	Australian Marriage Is
276	Peter Tatchell Foundation
277	Freedom to Marry
278	Mr Edward Heckathorn
279	Mr David Everingham
280	Reverend Paul Lee
281	Mr Robert Hyland
282	Mr Patrick Gowans
283	Name Withheld
284	Name Withheld
285	Name Withheld
286	Mr Mark Baumgarten
287	Mr Daniel Klop
288	Reverend Dr Christian Fandrich
289	Mr Peter Murray
290	Ms Gunnella Murphy
291	Dr John Challis and Mr Arthur Cheeseman
292	Mr Daniel Ip
293	Professor M. V. Lee Badgett

294	Mr Derek Cronin
295	Mr William Griffiths
296	Mr Tony Pitman
297	Mr Greg Smitheram
298	Dr Savitri Taylor
299	Dr Muriel Porter
300	Ms Kirstin Hanks-Thomson
301	Dr Russell Date
302	Reverend Nathan Nettleton, South Yarra Community Baptist Church
303	Mr Patrick Alexander
304	Mr Anthony Morton
305	Mr Peter Murphy
306	Mr Dennis Clarke
307	Ms Joan Smurthwaite
308	Father Mick Mac Andrew, Saint Mary's Catholic Parish, West Wyalong
309	Mr Ryan Arndt
310	Tasmanian Baptists
311	Dr Terence Dwyer
312	Dr Peter Wilkinson
313	The Right Reverend Ross Nicholson
314	Mr Ryan Robertson
315	Mr Gerald Leicester
316	Mr Hinton Lowe

317 Mr Robert Price

318 Mr Steve Duffy

319 Reverend Dr Jared Hood

320 Ms Dorothy Howes

321 Mr Paul Joswig

322 Mr Geoff Keech

323 The Rainbow Report

324 Sydney Gay and Lesbian Mardi Gras

325 Reverend Willem Vandenberg, Horsham Presbyterian Church

326 Mr Romony Rogers

327 Mr John and Mrs Geraldine Dayball

328 Mr Rudy Bell

329 Mr Daniel Miller

330 Ms Kristie Naylor

331 Name Withheld

332 Mr Damian Mateljan

333 Mr Bruce Collins OAM

334 Mr Elliot Wall

335 Mr Bart Vogelzang

336 Mr Bernard Bartsch

337 Mr Shaun Khoo

338 Mr Cameron Todd

339 Ms Hannah Lewis

340	Mr David Forster
341	The Reverend Dr Jonathan Inkpin
342	Ms Kathleen Jakovcevich
343	Ms Bridget and Ms Tammy Clinch
344	Reverend Peter Greenwood
345	Ms Michelle Swift
346	Mr Martin Howells
347	Ms Andriana Koukari
348	Mr John Mayger
349	Dr Brian Pollard
350	Ms Melinda Beasant-Commerford
351	Australian Capital Territory Government
352	Ms Pat Assheton
353	Name Withheld
354	SDA Members for Equality
355	Professor Thomas Frame
356	Castan Centre for Human Rights Law
357	Ms Amanda Butler
358	Australian Youth Forum
359	Mr Tim Wilson
360	N G Tam

ADDITIONAL INFORMATION RECEIVED

1 Book tabled by the Hon Michael Kirby AC CMG (M. Kirby, *A Private Life*, Allen & Unwin, 2011) at public hearing on 3 May 2012

2 Book tabled by the Hon Michael Kirby AC CMG (N. Wright (ed), *Five Uneasy Pieces – Essays on Scripture and Sexuality*, ATF Press, 2012) at public hearing on 3 May 2012

3 Outline of oral submission and relevant authorities from the European Court of Human Rights tabled by the Lawyers for the Preservation of the Definition of Marriage at public hearing on 3 May 2012

4 Presentation document tabled by the Assembly of Confessing Congregations within the Uniting Church in Australia at public hearing on 3 May 2012

5 Opening statement tabled by the Australian Catholic Bishops Conference at public hearing on 3 May 2012

6 Position statement tabled by Imagine Surry Hills Baptist Church at public hearing on 3 May 2012

7 Additional information tabled by the National Marriage Coalition (B. Muehlenberg, *Same-Sex Marriage: Everything Will Change*) at public hearing on 4 May 2012

8 Media releases tabled by the Australian Christian Lobby at public hearing on 4 May 2012

9 Book tabled by Professor Thomas Frame (T. Frame, *Children on Demand-The Ethics of Defying Nature*, University of New South Wales Press Ltd, 2008) at public hearing on 4 May 2012

10 Material on scientific studies tabled by the Australian Psychological Society at public hearing on 4 May 2012

11 Book tabled by the Australian Psychological Society (*Writing Themselves in 3 – The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, La Trobe University, 2010) at public hearing on 4 May 2012

12 Response to question on notice provided by Ms Gabrielle Appleby, Mr James Farrell, Dr Dan Meagher and Professor John Williams, University of Adelaide Law School, on 9 May 2012

13 Response to question on notice provided by Law Council of Australia on 11 May 2012

14 Response to question on notice provided by Paddington Uniting Church on 11 May 2012

APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, 3 May 2012

ARGENT, Mrs Shelley OAM, National Spokesperson, Parents and Friends of Lesbians and Gays

BENTLEY, Mr Peter, Executive Consultant, Assembly of Confessing Congregations within the Uniting Church of Australia

BROHIER, Mr Christopher, Founder, Lawyers for the Preservation of the Definition of Marriage

BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights, Law Council of Australia

BURKE, Ms Emily, Social Justice Intern, Gilbert and Tobin Centre of Public Law

CATT, Very Reverend Dr Peter, Private capacity

CHAMPION, Reverend Dr Maxwell, National Director, Assembly of Confessing Congregations within the Uniting Church of Australia

CHAPMAN, Mr Nigel, Secretary, Imagine Surry Hills Baptist Church

CHONG, Mr Vince, Chairman of the Board, Defence Lesbian, Gay, Bisexual, Transgender and Intersex Information Service

CROOME, Mr Rodney AM, Campaign Director, Australian Marriage Equality

EASTMAN, Ms Kate, Member, Law Council of Australia

GILMOUR, Reverend Benjamin, Minister, Paddington Uniting Church

GUTNICK, Rabbi Moshe, President, Organisation of Rabbis of Australasia

HERCOCK, Pastor Michael, Imagine Surry Hills Baptist Church

JOSEPH, Miss Mary, Research and Project Officer, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Australian Catholic Bishops Conference

KENEALLY, The Hon Kristina MP, Private capacity

KIRBY, The Hon Michael AC CMG, Private capacity

KOONIN, Mr Justin, Co-convenor, New South Wales Gay and Lesbian Rights Lobby

LYNCH, Professor Andrew, Director, Gilbert and Tobin Centre of Public Law

McPHERSON, Mr Malcolm, Board Member, Australian Marriage Equality

MENEY, Mr Christopher, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney, Australian Catholic Bishops Conference

MIMMO, Mr Rocco, Founder and Chairman, Ambrose Centre for Religious Liberty

PITTAWAY, Mr Alexander, Youth Ministry Leader, Metropolitan Community Church Sydney

RAJ, Mr Senthorun, Senior Policy Adviser, New South Wales Gay and Lesbian Rights Lobby

ROCHOW, Mr Neville SC, Counsel, Lawyers for the Preservation of the Definition of Marriage

SLUCKI, Reverend Stefan, Convener, Church and Nation Committee, Presbyterian Church of Australia

SMITH, Reverend Gregory, Pastor, Metropolitan Community Church Sydney

WHELAN, Mr Justin, Mission Development Manager, Paddington Uniting Church

WILSON, Ms Gina, Chair, Organisation Intersex International Australia

Melbourne, 4 May 2012

ALEX-BAILEY, Ms Sophia, Co-Chair, Coming Out Proud Program, Rainbow Tasmania

APPLEBY, Ms Gabrielle, Senior Lecturer, University of Adelaide Law School

BARLOW, Dr Fiona, Lecturer/Research Fellow, School of Psychology, University of Queensland and Psychologists for Marriage Equality

BROOKMAN, Reverend Ronald, Member and Advisor, National Marriage Coalition

BROWN, Ms Anna, Co-Convenor, Victorian Gay and Lesbian Rights Lobby

CALLEGARI, Mr Ben, Spokesperson, Psychologists for Marriage Equality

DUNJEY, Dr Lachlan, Convenor, Doctors for the Family

FARRELL, Mr James, Lecturer, Deakin University School of Law

FRAME, Professor Thomas, Private capacity

GARDINER, Mr Jamie, Adviser and Honorary Life Member, Victorian Gay and Lesbian Rights Lobby

GRIDLEY, Ms Heather, Manager, Public Interest, Australian Psychological Society

HALSE, Major Bradley, Territory Director, Government Relations, Southern Territory, The Salvation Army Australia

HART, Mr Duncan, National Convenor, SDA Members for Equality

HILLIER, Professor Lynne, Sexual Orientation and Gender Diversity Reference Group, Australian Psychological Society

MEAGHER, Associate Professor Dan, Deakin University School of Law

MUEHLENBERG, Mr Bill, Spokesman, National Marriage Coalition

RIGLEY, Dr Graeme, Divisional Commander, Southern Territory, The Salvation Army Australia

SIMON, Mr Daniel, Research Officer, Australian Christian Lobby

SOMERVILLE , Professor Margaret AM, Private capacity

TEGELJ, Mr Stefan, Melbourne Convenor, SDA Members for Equality

van GEND, Dr David, Chairman, Australian Marriage Forum

WALLACE, Mr Jim AM, Managing Director, Australian Christian Lobby

WILLIAMS, Professor John, Dean, University of Adelaide Law School