

**GUARANTEEING EQUALITY,
SECURITY AND CERTAINTY
FOR ALL:
THE CASE FOR SAME-SEX
MARRIAGE**

Submission to the Senate Standing Committee on Legal
and Constitutional Affairs

Inquiry into the Marriage Equality Amendment Bill 2010

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April 2012

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The attached Submission is made by the joint authors in their purely personal capacities.

April 2012

INTRODUCTION AND RECOMMENDATIONS

The proposals to provide for same sex marriage which are currently before the Australian Parliament will continue to ensure the law responds to human needs and aspirations and reflects social reality.

They represent the final step in the evolution of the law surrounding committed human relationships over the past 155 years, a process which began with the British Parliament passing the *Divorce and Matrimonial Causes Act* in 1857.

Successive developments have ensured that people in committed relationships are treated equally before the law, that their interests are protected, their rights are guaranteed and their responsibilities to each other and the community are understood.

These developments also recognise the different needs and aspirations of people in how choose to establish and conduct their relationships.

Most recently, these developments have recognised that both heterosexual and homosexual couples form meaningful committed loving relationships, and that both heterosexual and homosexual couples should have equal treatment before the law.

Most significantly, the law not only continues to recognise that marriage still remains central to way many people choose to define their relationships, but also recognises that couples differ in how they choose to marry, and the many variations in they way they live married life. Equally significantly, the law recognises that not all marriages last, and provides a robust, if not completely perfect mechanism for ending marriages and other close personal relationships with the aim of ensuring that both parties to the marriage are treated justly and fairly.

Complementing these developments is the changing approach of the law towards homosexual people and homosexual relationships – from being treated as criminals in the case of homosexual men to specific measures to ensure equality of treatment. These changes have mirrored changes in social attitudes, understanding and knowledge: the recognition that people who engage in consensual homosexual activity should not be treated as criminals; the recognition that homosexuality was not a psychological disorder, and finally the recognition that homosexuals also form loving committed relationships. This final understanding has led to homosexual couples being accorded the same status as heterosexual de facto couples.

Not everyone has welcomed these developments. Indeed, almost all were strongly resisted when they were first proposed. In some cases, this resistance delayed necessary law reform for many years. Much of this opposition was based on the belief that each step undermined the sanctity and primacy of marriage and the family. Opposition to the decriminalisation of consensual homosexual acts, anti-discrimination law and recognition of same sex relationships was motivated by similar beliefs, coupled with the belief that homosexuality was a moral and psychological disorder.

Indeed, the comprehensive nature of these developments have led some to observe, and in some cases complain, that there is little difference between marriage and other de facto relationships. Certainly there are now many areas where married and de facto couples are treated equally.

A significant difference between marriage and de facto relationships still remains. 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.

Not surprisingly, removing this remaining inequality has attracted the same strong opposition we have come to expect to significant social reforms. This opposition is consistent with history of the marriage, family and relationship law in Australia.

Every new development has been resisted by those who have insisted that the current statutory definition of marriage, “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”, is timeless, immutable and absolute.

In many cases, this resistance has been underlined by many opponents being ignorant of the history of marriage, and their failure to properly understand, acknowledge or distinguish between the appropriate roles of Parliament and the Church.

Many opponents cling to the idea that marriage is an exclusively religious - and even exclusively Christian institution. Some insist that its primary purpose is for procreation, and for establishing and sustaining families.

What they fail to recognise is that marriage in Australia has increasingly become an essentially civil institution which, for increasing numbers of people is also exclusively, or almost exclusively secular.

But not for everyone.

The strength of Australia's liberal democracy is that marriage can still maintain its traditional connections to the church, and still embody religious or Christian values where people regard these as important. But marriage can also be built on secular ethical values.

Insisting on marriage fitting a particular model also ignores the many and varied ways marriages are lived in the 21st century.

Married couples may establish a home together, but not always. They may make passionate love with each other, which may or may not lead to the birth of children. They may establish and raise families, but, increasingly frequently, may not. Their commitment to each other may or may not be expressed through sexual intimacy. Sexual intimacy may be frequent in some marriages, and extremely rare or non-existent in others. Its importance may change over time. Companionship, mutual

support, shared responsibilities and common interests may be equally important ways of expressing commitment, and their importance may vary over time.

Non-marital relationships – both heterosexual and homosexual - may also feature many of these elements. What is important is one or more of these factors may influence a strong desire to marry. Heterosexual couples can act on that desire. Homosexual couples cannot.

Parliament now has the opportunity to remove this last inequality.

As a consequence of these principles, and arising from the arguments which we present below, we wish to offer the following **Recommendations**:

1. That the definition of marriage in the *Marriage Act 1961* be amended to read that **“marriage’ means the union of two people, to the exclusion of all others, voluntarily entered into, for life”**.
2. That section 46 of the *Marriage Act 1961* be amended to reflect this changed definition.
3. That section 88EA of the *Marriage Act 1961* be repealed.
4. That Parliament give consideration to the need, if such recommendations are adopted, to amend section 47A of the *Marriage Act 1961* to ensure that ministers of religion are not required to perform same-sex marriages.

CHAPTER 1:

A ROSE BY ANY OTHER NAME

Words matter.

They are redolent with deep and inherent **meaning** in that they describe what we want to convey to another person about ourselves or others, or what others wish to convey about us. They define us by describing our status in a way which has actual **meaning** – either socially or legally.

When either of your submitters says that I am “an Australian” that defines us both inclusively (a native born and/or a citizen of this particular country) and exclusively (i.e. we are not Spanish or Sudanese). Similarly if we are described as an Australian “citizen” that signifies that we have certain legal rights (we cannot be denied re-entry to our own country) and obligations (if we are over 18 we are required to enrol to vote). If one of us is described as a “Senator” that means that we have been through a process of being elected or appointed to hold a particular office and it means that we are not a member of the House of Representatives nor eligible to serve on a jury, nor the holder of another country’s citizenship.

In other words, the way in which we are described both indicates something about **what we are** and something about **what we are not**.

Thus to be described either of us as “married” both tells another person what we are – namely a person who has been through a legally prescribed ceremony (secular or religious) and that we are in legal relationship with one other person which is unique, in that we cannot have precisely the same relationship with any other person at the same time, and furthermore that we are entitled under law to certain rights and subject to certain obligations.

Even if either of us were to be in a de facto relationship, recognised as such in law, we would still not be a “married person”. Our purely legal status (in terms of rights and obligations) may be the same but we are not defined in the same way as if we had been through the prescribed ceremony.

There is also an opposite of “married”, namely “not married” or “single”. Every “single” person is, by definition, not a married person. That is regardless of the fact that we may be in an exclusive, life-long, committed relationship with another person. We are still regarded by the law as “not married”.

Interestingly, in the English language, words such as “Australian”, “citizen”, “Senator” and “married person” have no gender. The use of any of them does not indicate whether the person concerned is male or female. In languages such as Spanish or Italian the word “married” must be gender specific: *casado/casada*; *sposato/sposata* because, at least linguistically, there is a difference between a

married man and a married woman and this must be stated and made obvious to the listener.

In English this is not the case.

Clearly then, the term “married” is both inclusive and exclusive. The question before the Senate is thus: does the Senate want to establish a legal definition of an interpersonal relationship which is an exclusive one privileging one type of relationship (involving a man and a woman) against another (involving people of the same sex).

The United States Court of Appeal for the Ninth Circuit in striking down Proposition 8 seeking to ban gay marriage in California stated that the Proposition was unconstitutional (as breaching the “equal protection” clause of the United States Constitution [Article 14.1]) because it:

“...serves no purpose, has no effect, other than to lessen the status and dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”

.....

“The name ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring and intimate relationships.....The designation of ‘marriage’ is the status we recognise. It is the principal manner in which the State attaches respect and dignity to the highest form of committed relationship and to the individuals who have entered into it.”¹

Recognising the power of words, it added, perhaps whimsically:

“Had Marilyn Monroe's film been called ‘How to Register a Domestic Partnership with a Millionaire,’ it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different.”²

Similarly, the Opinions of the Justices of the Supreme Court of Massachusetts to the State Senate (2004) states:

“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”³ (emphasis added)

In his Submission to the Inquiry, His Eminence George Cardinal Pell, in opposing changes to the Marriage Act writes:

¹ US Ninth Circuit Court of Appeal, *Perry v Schwarzeneger* (subsequently *Perry v Brown*) Judgment 10-16696, 7 February 2012 at p.39

² *Ibid* at p. 38

³ Quoted in Wolfson, Evan : *Why Marriage Matters* (Simon and Schuster,. New York, 2004) p. 123

“Such proposals fail to understand the immensely powerful role and influence of the law in our society.”⁴

We agree entirely with His Eminence.

Where we differ is that His Eminence asks the Senate to declare in law that homosexual people and couples are **not equal** to heterosexual ones and we ask the Senate to declare that **they are**.

⁴ Submission number 113

CHAPTER 2 :

THE AUSTRALIAN CONTEXT: RESPONDING TO SOCIAL AND LEGAL ADVANCES

The 111 years since Federation has seen Australia become a culturally diverse, tolerant and open society. Significant social and legal advances have been made in the status of women and homosexuals, and while much is still to be done for our Aboriginal and Torres Strait Islander people, they are now recognised as Australian citizens, and many Aboriginal and Torres Strait Islander people play an important role in Australian public life.

Significant changes have also occurred in the nature of human relationships and community attitudes towards human relationships. Change in the status of women has been one factor, the demands of modern economic life another. Relationships that were once almost universally condemned are now widely accepted.

Many of these changes have been shaped by the growth of scientific, social and cultural knowledge, increased exposure and acceptance to different ideas and cultures helped by the expansion of educational opportunities for all. Over the same period role and influence of the church and organised religion in the lives of many Australians has declined.

Not everyone has welcomed these changes. Many have been resisted by people and groups who have not only fought to maintain the status quo, but who predicted dire and calamitous consequences if change was allowed to occur. Some of this opposition has come from people who have been unwilling to open their minds to different points of view, or who have not had the opportunity to do so.

We are seeing this in the opposition to same-sex marriage. Sadly, they fail to recognise that allowing same sex couples to marry would be consistent with Australia's proud history of social and legal advances and further strengthen Australia's bedrock values of egalitarianism and a fair go.

It is therefore essential that Parliament understand and appreciate the nature and extent of social and legal change in three critical areas: human relationships, homosexuality and religion and religious belief.

The social context

Human relationships

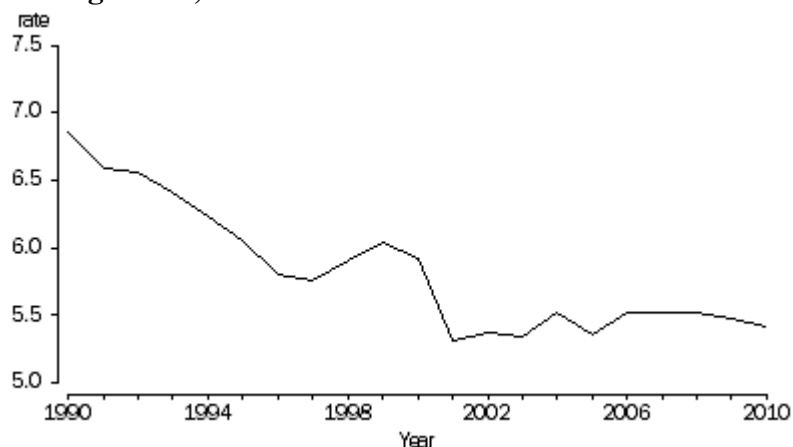
The changes of the past century are evident both in they way people conduct their relationships and attitudes towards human relationships.

Marriage

In 1901, the only socially sanctioned adult human relationship was marriage, with couples expected to remain married for life. Australians were expected to marry and raise families. Remaining single well into adulthood was seen as being unusual, with women who did not marry being regarded as “old maids”.

This changed over the century, and most significantly over the past 20 years. While the Australian population has increased, the proportion of the population marrying (the crude marriage rate) has declined, as the ABS graph below shows. Between 1990 and 2001, the crude marriage rate declined from 6.9 to 5.3 marriages per 1000 population. However, after a slight increase to 2004, there has since been little variation since 2005, with the crude marriage rate being 5.4 marriages per thousand population.⁵

1.2 Crude marriage rates, Australia - 1990-2010



Increasingly secular

As first enacted, the *Marriage Act 1961* provided for marriages to be solemnised by “authorised celebrants”: which not only included ministers of religion, but authorised officers of state or registry offices, other state or territory officers authorised by the Attorney-General by instrument in writing or any other “suitable persons” authorised by the Attorney-General by instrument in writing.

Prior to 1973, marriage in a state or territory office was the only available secular option. In 1973, the then Attorney-General, Lionel Murphy, exercised his authority under then section 39 (2) of the *Marriage Act* to appoint the first non-public servant as an “authorised celebrant”, Lois D’Arcy. This began the now well-established marriage celebrants program.

Successive amendments of the *Marriage Act 1961* provided for the appointment of marriage celebrants and set out the characteristics and qualifications they must have. None of these characteristics or qualifications require adherence to a religious faith or beliefs. They are required to be of good standing in the community, have knowledge

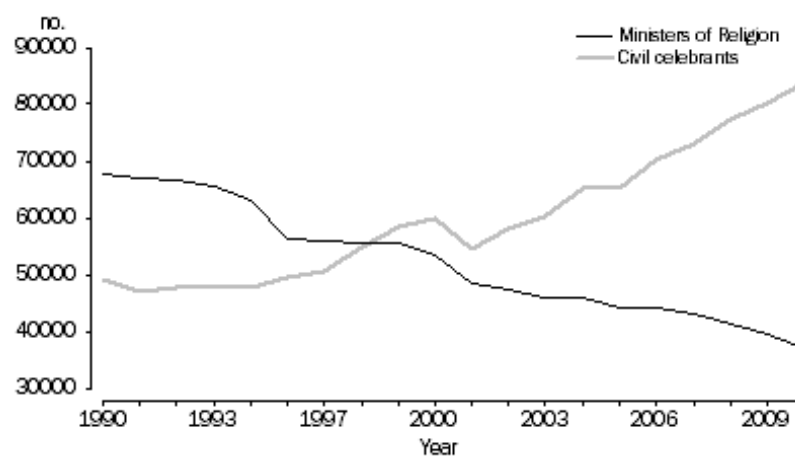
⁵ Australian Bureau of Statistics, 3310.0 - Marriages and Divorces, Australia, 2010 available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/893C1288678FD232CA2568A90013939C>

of the law relating to the solemnisation of marriages by marriage celebrants and be committed to advising couples of the availability of relationship support services.⁶

The *Marriage Regulations 1963* sets out the qualifications and skills required for registration as a marriage celebrant. These are a formal celebrancy qualification or a set of designated comparable skills, which must include fluency in an indigenous language.⁷ One such qualification is the Certificate IV in Celebrancy. Apart from covering the various legal requirements of the celebrant's role, this course also emphasises the need for celebrants to demonstrate respect for the powerful role of symbolism and ritual in honouring and celebrating life events and work with understanding of the celebrancy role in developing and delivering ceremonies to address wishes and values of clients in a non-judgmental way in both religious and secular contexts.

The constitutional and statutory provisions which ensure marriage in Australia reflect contemporary Australian society. As of 2011, there were 10274 celebrants authorised to perform marriages in Australia, compared to 23567 authorised ministers of religion and 504 authorised registry officers. Thus, civil celebrants comprise almost 30% of all authorised celebrants.

Despite their lower numbers civil celebrants perform the majority of marriages in Australia, and have done so since 1999. According to the Australian Bureau of Statistics, the percentage of marriages performed by civil celebrants has risen from 51.3% in 1999 to 69.2% in 2010. The ABS table below shows the concomitant decline in the number of marriages performed by Ministers of Religion.⁸



These developments support the view that marriage in Australia, both in law and in practice, is a secular civil institution. These developments do not prevent churches

⁶ *Marriage Act 1961*, section 39C

⁷ *Marriage Regulations 1963*, Regulation 37G

⁸ Australian Bureau of Statistics, *3310.0 - Marriages and Divorces, Australia, 2010*, last updated 13 February, 2012

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/893C1288678FD232CA2568A90013939C>

and religious organisations from continuing to solemnise marriages for the minority of Australians who prefer this option.

Civil marriage is able to easily accommodate same sex marriage. As suggested above, the Constitution and the Marriage Act 1961 prevent any obligations being imposed on a minister of religion to solemnise such a marriage. The Bills proposed by Stephen Jones MP and Adam Bandt MP both contain provisions which explicitly state that ministers of religion are not obliged to perform same sex marriages.

Given that religious organisations will be protected from having secular aspirations imposed on them, it is inappropriate and unfair that religious organisations should be permitted to continue to impose their values on the secular majority.

Divorce

For much of the 20th century, divorce was rare, and divorcees, particularly women, were often socially ostracised. Negative views about divorcees were encouraged by the law which only allowed divorce where a spouse could be proved to be at fault. Fault included being guilty of such sins as adultery, cruelty or desertion.

Society and Parliament accepted that couples should not be forced to live in loveless marriages, and the so called marital sins were often symptoms of a breakdown in the marital relationship. In 1975, the irretrievable breakdown of a marriage became the only ground for divorce.

In 2010, there were 50,240 divorces granted in Australia, an increase of 792 (1.6%) compared to 2009. Thus 2.3 divorces were granted per 1,000 estimated resident population – the crude divorce rate. This rate has fluctuated over the past two decades, peaking in 1996 and 2001, at 2.9 divorces per 1,000 estimated resident population, while the lowest rate of 2.2 occurred in 2008. These fluctuations reflect a changing population age structure, and a changing proportion of the population that is married.⁹ Based on the recent trend in divorce rates it has been estimated that around one-third of all marriages in Australia will end in divorce.¹⁰

With and without children

In 1901, there were strong social expectations that a married couple would have children and raise them, and these social expectations were largely met. For much of the 20th century the accepted social norm was “mum, dad and the kids”. In the 21st century, this traditional model of family life is in decline.

Between the 2001 and 2006 Censuses, the number of families increased from 4.9 million in 2001 to 5.2 million in 2006. While couples with children continued to be the most common family type over this period, this decreased as a proportion of all families. In 2001, couple families with children made up 47.0% (2.3 million families) of all families, decreasing to 45.3% (2.4 million families). The Australian Bureau of

⁹ *Ibid.*

¹⁰ Australian Bureau of Statistics "Love Me Do", *Australian Social Trends March 2012*, www.abs.gov.au/socialtrends

Statistics has projected that couple families without children would outnumber couple families with children in 2011.¹¹

By 2031, couples without children are projected to be the fastest growing family type, with the proportion of families with children in 2031 (38%) being overtaken by couples without children (43%).¹²

“For the good of the children”

For much of the 20th century, there were strong expectations that married couples would stay together “for the good of the children”. In the 21st century, the reality of divorce means that many children do not retain regular contact with both parents.

In 2009-2010, 49% of all divorces involved children. Of the 5 million children aged 0–17 years, just over 1 million, or one in five (21%), had a natural parent living elsewhere. For four fifths (81%) of these children, the parent living elsewhere was their father. Nearly three quarters (73%) of these children were in one parent families, 14% lived in step families, and 11% lived in blended families.¹³

Living together, but not married

In 1901, a man and woman who lived without being married were said to be “living in sin”, a view conforming with church teachings which insisted that sexual intercourse should only occur within marriage. These teachings helped ensure that attitudes towards de facto relationships remained censorious for much of the 20th century.

By the 1970s, there were strong signs of change. An analysis of three opinion polls taken between 1971 and 1977 found a decrease in disapproval of de facto relationships. In a 1971/72 poll, 51% cent of persons interviewed indicated disapproval of “unmarried couples living together”. In 1976 poll when the answers provided went beyond “disapprove”, 34 per cent of persons indicated that they considered “unmarried couples living together” to be “wrong/dangerous”. In a 1977 poll 35 per cent of persons indicated disapproval. The most significant change was in the attitudes of women. In 1971/72 only 29 per cent “approved”. This had risen to 50% in 1977. The 1977 poll also revealed that age was also significant. 16 percent of people under 30 expressed disapproval, compared to one-third of people aged between 30 and 49.¹⁴

A Morgan telephone Poll conducted in August, 2010 indicates the ready acceptance of unmarried couples living together: 85% of voters surveyed were not worried by having a Prime Minister who is not married, and living in a de facto relationship. They were more concerned about “having a Prime Minister who has conservative values in relation to such things as abortion and stem cell research” than “having a

¹¹ Australian Bureau of Statistics, *Households and Families, 1301.0 - Year Book Australia, 2009–10*, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/916F96F929978825CA25773700169C65>

¹² Australian Bureau of Statistics, “Australian households: the future”, *Australian Social Trends December 2010*, www.abs.gov.au/socialtrends

¹³ Australian Bureau of Statistics “Love Me Do”, *op cit*.

¹⁴ NSW Law Reform Commission *Report 36 - De Facto Relationships*, 1983 <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36APPENDIXD>

Prime Minister who doesn't believe in God ... a Prime Minister who is not married, living in a de facto relationship".¹⁵

These results reflect the increased numbers of Australians living in de facto relationships. Between 1982, when the Australian Bureau of Statistics first collected data on de facto relationships, and 200-2010, the percentage of Australians aged 18 years and over living in a de facto relationship had more than doubled: 11% (1.9 million) in 2009-2010¹⁶ compared to 5% in 1982.¹⁷

In 2009-2010, de facto relationships were most common amongst younger people, with one fifth (22%) of people aged 20-29 years living in these relationships, compared with nearly one tenth (9.4%) of people aged 40-49 years.

Living together prior to marrying has also increased over the last twenty years. In the early 1990s, just over half of all registered marriages were preceded by a period of cohabitation (56% in 1992). By 2010 it was almost eight in ten (79%).¹⁸

De facto relationships are no longer the province of non-believers. Despite the primacy that the major Christian denominations give to traditional marriage a significant proportion of their adherents are in de facto relationships as the table below shows. Significantly, the proportion of Anglicans and Catholics in de facto relationships is approximately half of those with no religion.

De Facto Relationships – Organised religion		
Religious Group	Rate of Marriage within the Religious Group	Proportion of all relationships which are de facto
Mainstream Christian Religions		
Anglican	59.8	13.5
Lutheran	54.6	13.0
Catholic	63.4	12.9
Buddhism	78.4	11.2
Salvation Army	53.7	10.9
Presbyterian	40.5	10.7
Uniting Church	56.1	9.5
Baptist	69.1	7.3

¹⁵ Roy Morgan Research, <http://www.roymorgan.com/news/polls/2010/4551/>

¹⁶ Australian Bureau of Statistics "Love Me Do", *Op cit.*

¹⁷ Australian Bureau of Statistics "Family Formation: Trends in de facto partnering", Australian Social Trends, 1995
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/96d80c4fe328a512ca2570ec00751800!OpenDocument>

¹⁸ Australian Bureau of Statistics "Love Me Do", *Op cit.*

De Facto Relationships - Other religions		
Judaism	82.7	8.5
Latter-day Saints	82.7	7.8
Seventh-day Adventist	78.4	7.6
De Facto Relationships - Others		
Nature Religions	36	42.8
Spiritualism	40	27.3
No Religion	69.1	27.1

Source: ABS 2006, National Population and Housing Census.¹⁹

Married, but not living together

In 1901, the overwhelming majority of married couples established a home together and were expected to share it until parted by death.

Toward the end of the 20th century this was not necessarily the case. Over 35 years ago, the late Adele Koh described her marriage to the late Don Dunstan in a "My Sunday" column in *Nation Review*. She had not moved permanently into Dunstan's Norwood home, instead, dividing her time between her own apartment and his home. Sometimes he stayed with her. Her column suggested that the arrangement worked very well. She had her own career. Dunstan was then Premier of South Australia. Their time together was time together.

The married but living apart arrangement was later adopted by a much more conservative couple. In the 1990s, contemporary media reports suggested that the late former Premier of Queensland, Joh Bjelke-Petersen and his wife Flo were living apart, at least for some of the year: Joh in Tasmania and wife Flo in Queensland.

Another example from the 1990s is that of Nelson Mandela and Graca Machel. On 18 July, 1998 President Mandela and Graca Machel married, formalising a close relationship that had existed for some time. Graca Machel retained her home in Mozambique, during the time Mandela President of South Africa, spending two weeks a month at home, and two weeks with Mandela in Johannesburg.

While these may be isolated examples, the possibility of couples living apart, with separate households is becoming more common, according to demographer, Bernard Salt, and he is not simply referring to fly-in, fly-out mining. He writes:

"... with more career couples re-partnering later in life I can see a market for this: if you are a 45-year-old with some relationship history you might be a tad cautious about tossing in your lot with an unproven but I am sure delightful lover. It's a way of hedging your bets. But of course you can't say to your committed lover "look, darling, I want to hedge against the possibility that you and I might not work out so I've decided to keep my household separate."

¹⁹ Marriage Within and Outside the Religious Group" *Pointers*, Bulletin of the Christian Research Association June 2009. Volume 19, Number 2.p11

“No, of course it's not that I am not committed; in fact, what I am proposing is the latest fashionable kind of relationship: we will be Living Apart Together.

“Somehow I think we'll be seeing a whole lot more LAT relationships in the post-45 and especially the post-55 market over the coming decade.”²⁰

Homosexuality

In 1901, any male adult who engaged in consensual homosexual activity in any state in Australia risked imprisonment for an extended period. Homosexuality was generally regarded as a perversion or abnormality. The idea that homosexual men or lesbians could form loving relationships would have been met with incredulity at best. Homosexuals who established long term relationships did so at great risk to themselves. These attitudes continued well into the 20th century.

More than a century later the position of homosexuals has significantly changed. Homosexuality ceased to be classified as a psychiatric disorder in 1973. Many more people are willing to publicly identify. People who are openly homosexual occupy senior positions, including leadership positions, in government and the corporate, public and community sectors.

Same sex couples have been counted in the five yearly census since 1996, with around 50,000 people identifying that they are in a same-sex relationship. The Australian Bureau of Statistics notes that this may undercount of the true number of people living in same-sex relationships, as some people may be reluctant to identify as being in a same-sex relationship, while others may not have identified because they were unaware that same-sex relationships would be counted in the census.²¹

Community attitudes to homosexuality have changed reflecting the increasing diversity of Australian society, with the proportion of who believe homosexuality is wrong significantly declining. A survey conducted in 1989-1990 found that 72% of people surveyed believed that male homosexuality was always wrong, and 66% believed female homosexuality was always wrong. In 2001, only 31.8% of those surveyed believed sex between two adult men was always wrong, and only 23.2% believed between two adult men was always wrong.²²

An online survey conducted by Angus Reid Public Opinion found that 65% of Australians acknowledge that they have gay or lesbian friends or relatives.

Given these changes, it is difficult to accept that church teachings condemning homosexuality genuinely represent the views of the wider Australian community. We suspect that even most conservative of religious people have accepted the reality of

²⁰ Salt, Bernard "The delight of couples living apart", *The Australian* 24 March, 2012, <http://www.theaustralian.com.au/business/opinion/the-delight-of-couples-living-apart/story-e6frg9jx-1226306496889>

²¹ Australian Bureau of Statistics, *Couples in Australia*, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>

²² de Vaus, David *Diversity and change in Australian families: Statistical profiles*, Australian Institute of Family Studies 2004, p87.

changing attitudes towards homosexuality. While religious groups strongly resisted the decriminalisation of consensual homosexual acts, few if any, would seriously propose turning back the clock.

This is not to suggest that homosexuality and homosexuals are universally accepted. Church teachings continue to give comfort to those sections of the Australian community with strong prejudices against homosexuals. Discrimination and harassment are still realities for many homosexuals in the workplace and for those who live outside cosmopolitan urban centres. Same sex attracted young people still face major challenges in coming to terms with the sexual identity. In some cases, the difficulty in dealing with these challenges can have serious adverse consequences, such as depression and even suicide.

In the past 30 years however, there has been a growing recognition of the consequences of ignorance and prejudice. There are now mechanisms available which enable discrimination to be addressed. Agencies such as the police, which historically had a deeply hostile relationship with homosexuals, are working to address this. Governments, health professionals and the education system are increasingly recognising the needs of same sex attracted young people and working to ensure they are met.

We understand that the Committee will receive many submissions which discuss these issues in more detail, and stress the importance of same sex marriage in addressing them. We request that the Committee give considerable weight to these submissions.

Religion and religious belief

In 1901, Australian society in 1901 was predominantly Anglo-Celtic, with the exception of a small but significant Lutheran population of Germanic descent. It was also overwhelmingly Christian, with 40% of the population being Anglican, 23% Catholic and 34% belonging to other Christian denominations. Only about 1% professed non-Christian religions.²³

An examination of census results between 1947 and 2006 has found significant change in involvement in organised religion. The percentage of people who identified as Christian declined from 88% in 1947, to 63.9% in 2006, while the percentage who stated they had no religion increased from 0.3% in 1947 to 18.7% in 2006.²⁴

Several other surveys have also shown a continued decline in religious belief and religious activity in Australia. In late 2009, 1718 adult Australians were surveyed as part of the International Social Science Survey using the same set of questions as had been used in 1993. The results showed that among Australians, most measures of religion show significant decline:²⁵

²³ Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview, 2011*, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/32049C1F6913E595CA257968000CB4B2>

²⁴ Bouma, Gary; Cahill, Desmond Dellal, Hass Zwartz Athalia *Freedom of religion and belief in 21st century Australia*, Australian Human Rights Commission 2011 p16

²⁵ "Are Australians losing their religion?" *Pointers*, Bulletin of the Christian Research Association June 2009. Volume 20, Number 2. pp1-4.

- § Attendance at religious services (at least once a month): 16 per cent of the population compared to 23 per in 1993;
- § Belief in God (including those who believe but have doubts, and those who believe sometimes) fell from 61 per cent to 47 per cent;
- § Less than one quarter of the Australian population now say they believe in God and have no doubts about it;
- § Identification with a Christian denomination has fallen from 70 per cent in 1993 to 50 per cent of the population.
- § Those claiming to have 'no religion': up from 27 per cent in 1993 to 43 per cent in 2009 - much higher than the 19 per cent who said they had no religion in the 2006 Census and in previous ISSP surveys.²⁶

The survey found that the readiness of people to identify with a Christian denomination had most significantly declined among younger people:

Age range	2009	1993
15 - 29	33	60
30 - 39	47	64
40 - 49	46	62
50 -59	53	76
60- 69	63	76
70 plus	73	83

The survey also found that church attendance varied according to age:

When born	Never attend	Attend yearly	Attend monthly
1980 and after	53	39	8
1970 - 1979	24	59	17
1960 - 1969	42	47	11
1950 - 1959	32	54	14
1940 - 1949	17	60	23
1939 and before	12	59	29

Consistent with these findings, the most recent National Church and Life Survey, undertaken on behalf of the major Christian denominations, found that the population of church congregations did not reflect the wider Australian population: church congregations are aging at a faster rate and fewer young people are attending church.²⁷

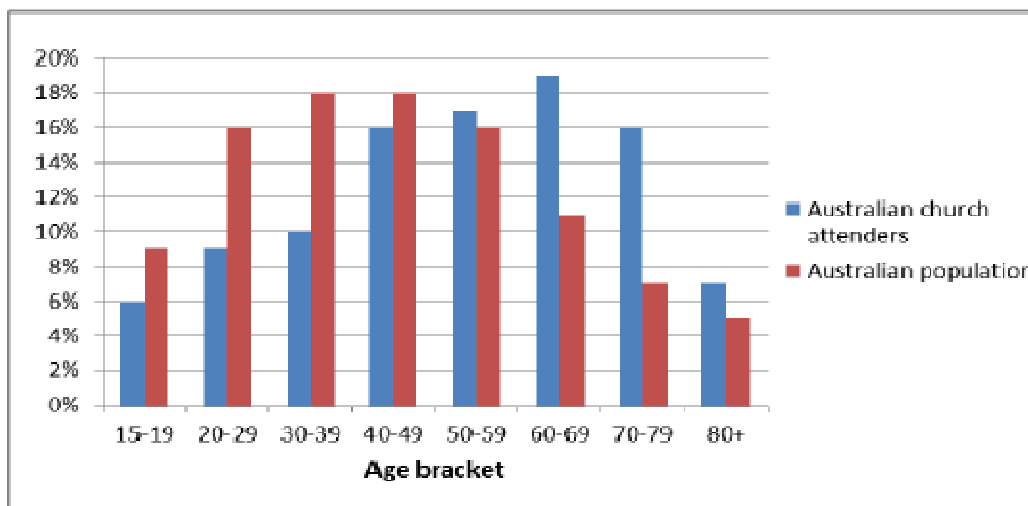
- § 34% of the Australian population aged 15 plus are in the 20 to 39 age group; however, only 19% of all church attenders aged 15 plus are in this age group;

²⁶ The difference is partly explained by the 2009 survey asking people first if they had a religion before asking their actual religion. In other surveys and the Census, people simply chose their religion from a list in which 'no religion' was an option, and in the Census question about religion is optional.

²⁷ Pippett, Michael; Powell, Ruth; Sterland, Sam and the NCLS Research team, *The Demographics of a Nation: Australia and the Church Denominational Research Partnership* Topic Paper 10 NCLS Research 2011

- § The percentage of church attenders under 40 has declined: 25% in 2006 down from 29% in 1996;
- § The percentage of church attenders aged 60 and over has increased: 42% in 2006 up from 34% in 1996;
- § The mean age of all church attenders is 53.3 years, with the mean ages for various denominations being:
 - Pentecostals: 39.4
 - Baptists: 46.8
 - Anglicans: 54.7
 - Catholics: 55.9
 - Uniting Church: 61.3.

The table below shows how church attenders compare to the Australian population for each age group.



Given that age is a significant determinant of religious attachment and church oriented activity, it is likely that both will continue to decline and with it the role that the major Christian denominations play in the lives of Australians. Given this, it is reasonable to question the extent to which their views and values reflect the views and values of most Australians, and whether they influence they seek to exercise is disproportionate to their support.

The legal context

Homosexuality

Over the past 40 to 50 years, all changes to the law have improved the status of homosexuals with one exception.

Beginning with South Australia in 1972, all Australian states and territories have removed criminal sanctions against consensual male homosexual activity. In 2008 the Commonwealth Parliament amended 85 laws which discriminated against

homosexuals, ensuring that homosexual couples have the same rights, entitlements and responsibilities as heterosexual de facto couples.

While it may vary from state to state, the age of consent is now the same for both heterosexuals and homosexuals.

Beginning with NSW in 1982, all states have legislation which outlaws discrimination against homosexuals, in NSW explicitly. Other states outlaw discrimination on the grounds of sexual orientation, sexual orientation or “lawful sexual activity”.

In 1994, the NSW Parliament amended the *Anti-Discrimination Act 1997* to outlaw homosexual vilification at a time when there was growing community concern about prejudice motivated violence against homosexuals.

The NSW and Western Australian Parliaments have recognised that an increasing number of homosexual couples are parenting children. In some cases these are the naturally born children of one partner. In other cases the couple have taken on the significant responsibility of fostering children, often children who have been difficult to place with other foster parents. In 2002 the Western Australian Parliament and in 2010 the NSW Parliament legislated to allow same sex couples to adopt children.

Several states have recognised the difficulties that de facto couples, including homosexual couples may have in proving the existence of their relationship to others, or for legal purposes. To respond to this they have introduced registration type schemes which enable couples to make declarations that they are in a relationship, and to have these declarations recorded.

Each of these changes was strongly resisted.

The one exception to these legal advances is the *Marriage Amendment Act 2004*, which explicitly defined marriage to exclude same sex couples, to prohibit same-sex marriages contracted overseas being recognised in Australia and to terminate any such claims for recognition on foot at the time of the enactment of the legislation.

Human relationships

When Australia became a nation in 1901, the new Commonwealth Constitution gave the Federal Parliament to legislate in relation to marriage, “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants”.²⁸

Despite this, the law relating to marriage and divorce remained the province of the States for around the first sixty years of Federation. This resulted in a hodge-podge of divorce laws with significant variations between the states in the grounds for divorce and the procedures for obtaining a divorce. These differences preceded Federation and reflected the timing when each colony acted and the different approaches each colony took. Henry Finlay, a former Associate Professor of Law at the University of Tasmania, has suggested that these different approaches:

²⁸ Commonwealth Constitution, Section 51 (xxi) and (xxii)

“... came down to a simple conflict between religious and moral attitudes against divorce, and a view that was both pragmatic and compassionate in favour of relieving the plight of deserted wives and children.”²⁹

The response to the initial attempt to introduce a national divorce law, in the first year of Federation, delayed any further attempts to the 1950s.

On 11 September 1901, Tasmanian Senator Henry Dobson introduced a *Matrimonial Causes Bill*, based on the NSW Act. It was not debated. Just over a year later, on 10 October 1902, he withdrew his Bill, saying he was not ready to proceed with it.

Between September 1901 and October 1902, the Bill provoked a severe backlash, with numerous petitions being lodged in the Senate. They represented virtually every Christian denomination in every state. All used similar arguments and many had identical wording, asserting that Senator Dobson’s Bill was against the law of God and the New Testament. For example, the Wagga Wagga Presbytery urged its Moderator to sign the petition opposing the Bill:

“... on the grounds of public morality, and re-affirming the principle held by this church, that ‘nothing but adultery or wilful desertion as can no way be remedied’ is cause sufficient for dissolving the bond of marriage.”

A large number of the petitions stated:

“That the statistics of the various States of the Commonwealth and of other countries prove that increased provision for easy Divorce tends to weaken the popular respect for marriages, to lower the national ideal of its sacred and abiding obligations, causes cruel injustice to children and endangers the stability of the home which is such an important factor in the well being of the State.”

The opposition to the Dobson Bill effectively delayed the enactment of a national Matrimonial Causes Bill until 1959. In the next chapter, we explore how the Commonwealth finally became involved in providing beneficial marriage and family law legislation.

During a Parliamentary debate on an earlier Private Member’s Bill, future Prime Minister Gough Whitlam, then a backbencher, explained the delay:

“The power to legislate in regard to divorce and marriage has been in the hands of this Parliament ever since it was constituted. It is indicative of the timidity of all parties which have held office in this Parliament that a uniform divorce law has never been introduced. The sanctity of the marriage tie should not vary on each side of the border between States or the border between a State and a territory. The Commonwealth has always had this power and except in the legislation ten years ago, has always refused to exercise it. This

²⁹ Finlay, Henry, *To have and not to hold: A history of attitudes to marriage and divorce in Australia 1858-1975*, (The Federation Press 2005, Google e-book), p 50.

is one of the subjects where the opposition to Commonwealth legislation is not due to any feeling that the States can exercise the power better than the Commonwealth, but the feeling that it is a power which neither the States, nor the Commonwealth, nor anyone else should exercise.”³⁰

Over the past three decades, the courts and the various state parliaments have responded to the fact that not all couple relationships are marriages. In 1981, the then NSW Attorney-General requested the NSW Law Reform Commission to conduct an inquiry into the law and de facto relationships.

The inquiry resulted in a report which included a draft *De Facto Relationships Bill* to provide for statutory recognition of de facto relationships and a framework for the adjustment of property interests when such relationships ended and the recognition of de facto relationships in inheritance.

The proposals prompted strong opposition, with petitions such as the following being tabled in the NSW Parliament:

“That we, believing that marriage should enjoy the favour of the law and that de facto relationships should not be encouraged, call upon the Government to reject the recommendations contained in the report of the New South Wales Law Reform Commission on de facto relationships, of June 1983, on the basis that the aforementioned recommendations seek to legalize cohabitation agreements, provide for a form of registration of de facto relationships and otherwise grant to people living in de facto relationships the same or similar legal rights as married people in the matters of financial adjustment, adoption of children, inheritance of property and accident compensation. The recommendations will undermine the institution of marriage by promoting de facto relationships as an acceptable alternative thereto, will grant legal rights to de facto partners to the detriment of the legal rights of married spouses and their children and will add substantially to the costs faced by the community. The recommendations fail to take into account the best interests of children by making them subject to adoption by de facto partners, and will encourage de facto relationships and thereby increase instability in family life.”³¹

In 1984, the NSW Parliament enacted Australia’s first De Facto Relationships Act. Other states followed. During the first years of the 21st century, all state parliaments with the exception of Western Australia referred their legislative powers over de facto relationships to the Commonwealth. In 2008 the Commonwealth Parliament amended the *Family Law Act* giving it authority to resolve disputes arising from the breakdown of de facto relationships.

Religion and religious belief

Despite the strong objections from the churches and religious organisations to many of these advances, the law has not only readily accommodated them, but protected

³⁰ Quoted in Finlay, op cit p301

³¹ Legislative Assembly of NSW Hansard, 10 May 1984, p558.

religious freedom. These provisions flow in part from section 116 of the Constitution which states:

“Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

The *Marriage Act 1961* places no requirements on the way the churches should solemnise marriages, instead leaving it to the church. Section 45 (1) of the Act states:

“Where a marriage is solemnised by or in the presence of an authorised celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister.”

Ministers are also given complete discretion in determining who they marry. Section 47 of Act states that nothing in the Act relating to the solemnisation of marriage:

- (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or*
- (b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:

 - (i) longer notice of intention to marry than that required by this Act is given;*
 - (ii) or requirements additional to those provided by this Act are observed.**

Churches or religious organizations in Australia and elsewhere readily exercise this freedom by refusing to marry people who otherwise have the legal right to marry in line with their own doctrinal positions.

The best known is the range of positions that the various religious faiths take adopt towards marrying divorced persons, from absolute refusal, to allowing marriage in certain circumstances, to no objections whatsoever.

Thus, the (presumptive) next Head of State of Australia, and Supreme Governor of the Church of England, HRH The Prince of Wales was unable to marry his second wife in the Church of England (which prohibits divorced people remarrying in church) and married her in a civil ceremony. Many years before, his sister, Anne, The Princess Royal was unable to marry her second husband in the Church of England and had to travel to Scotland for performance of the marriage.

Significantly, the Anglican Church of Australia has amended its canon law to allow divorced persons to marry with the permission of a Bishop.

Another example relates to cousin marriages. On this matter different churches/faiths take differing positions. The Roman Catholic Church allows marriages beyond first cousins but they may be married by dispensation. [First and second cousin marriages were banned by the Council of Agde in 506 AD, relaxed back to third cousins by the Fourth Lateran Council in 1215, to second cousins by Benedict XV in 1917 and to the

current status under John Paul II in 1983.] This of course has nothing to do with an understanding of genetics (especially in AD 506), despite the claim by Catholic Bishop James Foley for extraordinary prescience about genetics in relation to rules of consanguinity.³²

Most Protestant/Reformed churches generally allow cousin marriage, based on the rejection by Calvin and Luther of the Catholic policy of dispensation and on the fact that there are many first cousin marriages in the Old Testament. The Church of England allows such marriages, and indeed Queen Victoria and Prince Albert were first cousins.

There is no prohibition on cousins marriages in Judaism or Islam and indeed the percentage of first cousin marriages in some Islamic countries may be between 30% and 50%. There are generally much higher levels of first cousin marriages among Australian Muslims than among other faiths.

The point at issue is however that although first cousin marriages are permitted and recognised under Australian law, the law would not operate to force any church to marry first cousins (or divorced people – see above) if that were against the religious tenants or doctrinal position of that faith.

Exactly the same principle would apply to the churches/faiths in the event of gay marriage legalisation. There always has been and always will be the possibility that civil/secular and religious/faith-based marriage qualifications will be different. In law however, both are equal.

Given this, it would be entirely consistent with other legislation to exempt churches from being required to solemnise marriages between people of the same sex. Moreover, churches and religious organisations would remain free to express their disapproval of such marriages.

³² See Foley, James: "Marriage worth preserving as its stands", *The Australian*, 13/14 August 2011

CHAPTER 3 :

MARRIAGE AND FAMILY LAW AS BENEFICIAL LEGISLATION

Given that the current debate revolves around a Bill before the Senate to remove provisions in legislation which are discriminatory against a specific minority group (same sex couples) it is worth examining the broad history of legislation related to marriage which has been passed by the Commonwealth Parliament.

A review of this legislation reveals that:

- Until 2004 every piece of legislation was designed to expand the opportunities for marriage and to extend protection to people in a marriage-related environment, and
- That all such votes were conducted on a non-part/non-partisan “free” or “conscience” vote basis.

The Commonwealth came late into the field of legislation related to marriage despite the fact that control in this area was vested in the Commonwealth by virtue of the original provisions in the Constitution.

Marriage (Overseas) Act 1955

On 1 June 1955 Prime Minister Menzies moved the second reading of the *Marriage (Overseas) Bill 1955* the aim of which was “to facilitate marriages of Australian citizens and members of the defence force outside Australia.” It was modelled on the *Foreign Marriages Act 1892* of the United Kingdom and ensured that overseas marriages were recognised in Australia provided that they were contracted “in conformity with the law of that (overseas) country” and this was justified by Australia’s recognition of the “well established provisions of what is called private international law.” There had been some dispute over the validity of such marriages performed “by chaplains” and the Bill was designed to overcome such problems.³³

By way of background to this legislation, it should be noted that members of the Australian Occupation Forces in Japan (after the War) had been specifically forbidden to marry Japanese women and, if they defied the ban, their wives were specifically prohibited from entering Australia with them on their return.

In every respect the Bill was beneficial – it extended marriage rights in areas otherwise in dispute and it was introduced/debated as a non-party/partisan matter, being agreed to on the voices.

³³ House of Representatives, *Hansard*, 1 June 1955 p. 1291/2

Matrimonial Causes Act 1959

On 14 May 1959 Attorney General Barwick moved the Second Reading of the *Matrimonial Causes Bill 1959* which was designed to use of the constitutional power of the Commonwealth to introduce “one law with respect to divorce and matrimonial causes and such important ancillary matters as the maintenance of divorced wives and the custody and maintenance of the children of divorced couples.”³⁴ In doing so, the Attorney General made clear that the Bill was designed to support marriages, especially through the provision of support for marriage guidance organisations and to reform the law in relation to suits for the restoration of conjugal rights. In an elaborate table set out in the *Hansard* the Attorney enumerated the fourteen grounds upon which divorce might be granted.³⁵

Throughout his speech the Attorney emphasised the rationale for the Bill in terms of people (primarily women) who suffered as a result of the breakdown of a marriage. A close reading of the parliamentary debates reveals the concerns of Members to safeguard the position of women whose husband’s had abandoned them and moved inter-state, or more significantly the protection of “Australian women and girls” who had married overseas servicemen stationed in Australia during the War who had subsequently returned “home”, primarily to the United States.

Noting the significance of this measure within the broader social environment, Barwick declared:

*“Thus, though this Bill is a government measure, the Leader of the House has announced the government’s decision not to require any party alignment in the voting upon it. I hope the Opposition will follow the same course.”*³⁶

In response, the Leader of the Opposition (Hon H V Evatt) declared:

*“The Australian Labor Party, after considering the Bill itself and realising its importance, unanimously resolved that it should be treated as a non-party measure..... We believe that no question of party politics can properly come into the discussion.”*³⁷

In the event that Bill was passed by the House by a margin of 84 votes to 16 and in the Senate by 44 votes to 7.

It is interesting that during the public debate on this Bill the attention of the Government was drawn to the actions of the Protector of Aborigines in the Northern Territory denying the right of an Aboriginal woman (Gladys Namagu) to marry her white partner (Mick Daly).³⁸ This outright discrimination, similar to the legislation

³⁴ House of Representatives, *Hansard*, 14 May 1959, p. 2222

³⁵ *Ibid* p. 2233

³⁶ *Ibid* p. 2238

³⁷ House of Representatives, *Hansard*, 13 August 1959, p. 235

³⁸ Croome, R. “A history of marriage in Australia”, *The Drum*, 1 July 2011

rendered invalid in the United States only as late as 1967,³⁹ was specifically repudiated by the federal government of the day.

Marriage Act 1961

The Second Reading Speech of Attorney General Barwick on the *Marriage Bill 1960* is extensive and sets out the rationale for the legislation in great detail. The Bill was described as “a necessary complement to the Matrimonial Causes Act”⁴⁰ and to incorporate the provisions of the Marriages (Overseas) Act 1955-58. The Bill drew upon the principles outlined in Lord Hardwicke’s Act (26 Geo II c.33) which sought to regularise “matters of procedure and with the capacity of parties to enter the married state.”

It also addressed the “legitimisation of children” and enacted minimum ages for males (aged 18) and females (aged 16) to marry – thus standardising requirements which, until that date had varied among the States.

Indeed, those who seek to claim that marriage arrangements and qualifications are immutable, or should not be subject to change as social attitudes and norms within the wider community change may care to contemplate these words of Attorney General Barwick:

*“... for in the eastern, and most prosperous parts of Australia, the traditions of the common law, which in turn followed those of Roman law are maintained. A marriage of a lad of fourteen to a girl of twelve is acceptable in these States and a marriage below those ages down to the age of seven years is but voidable, so that cohabitation after fourteen or twelve years of age, as the case may be, makes a good marriage.”*⁴¹

Thus, only just over fifty years ago, Australian law recognised and provided for “a good marriage” of twelve and fourteen year olds. This would be unacceptable these days because of our changing social attitudes and values – thus demonstrating that Australian marriage law has always been sensitive to matters beyond mere “tradition” or the immutability of marriage arrangements and forms.

Interestingly the Bill made “provision ... to recognise religious bodies and organisations for the purposes of the act.”⁴² This is significant in that a piece of secular law provides for the rights of religious organisations to be involved in the solemnisation of marriages (according to their respective rites), a matter previously within purely secular jurisdiction. This gives the legislative lie to the claim that marriage is somehow a religious rite – if it is – then it is only by grace and favour of the secular parliament and within the rules prescribed by it. The Bill made clear that

³⁹ United States Supreme Court, *Loving v Virginia* 338 US 1

⁴⁰ House of Representatives, *Hansard*, 19 May 1960, p. 2000

⁴¹ House of Representatives *Hansard*, 19 May 1960 p. 2002. Attorney General Barwick informed the House that in 1959 there had been “in the three eastern states combined, 2 girls aged thirteen, 36 girls aged fourteen and 245 girls aged fifteen (who had been) married whilst 36 boys aged sixteen and 184 boys aged seventeen were married”. Interestingly some Members argued that the age limit for marriage should not be raised and should be left as they were.

⁴² *Ibid* p. 2004

“nothing in it” requires a minister of religion to act in disregard of the practices or tenants of his faith or doctrine. The Bill also provided that marriages could take place at any time, any place or any day, whereas previously marriages could only be conducted between the hours of 8.00 am and 8.00 pm.

Attorney General Barwick made special mention of the fact that:

“Mr Speaker, it will be observed that there is no attempt to define marriage in this bill. None of the marriage laws to which I have referred contains such definition. But insistence on its monogamous quality is indicated by, on the one hand the provisions of the Matrimonial Causes Act, which render a marriage void where one of the parties is already married, and by a provision in this bill making bigamy an offence.”⁴³

This position was supported by the Labor Opposition with Mr Kim Beazley (Snr) agreeing that “I do not think it is necessary to have such a definition.”⁴⁴

In light of the current unfounded claims by opponents of same-sex marriage that Australian legislation was all about gender specificity or the procreation of children, the clear statement of its original intent should be noted.

As with the Matrimonial Causes Bill, Attorney General Barwick made clear that:

“While the government takes, of course, the full responsibility for having made the proposals which it will support as a government, the measure will not be treated as a party measure and, as in the case of the Matrimonial Causes bill last year, members will be free to adopt their own attitudes, and to express their vote, freely.”⁴⁵

The Labor Party’s support of a free vote was announced by Deputy Leader EG Whitlam and the bill passed in both Houses on the voices without a division/vote being recorded.

Once again, legislation related to marriage was passed on the basis that it was beneficial in effect, protected the rights of parties and was non-party/partisan in its consideration.

Hague Convention and Marriage Amendment Act 1985

The Hague Convention on the Recognition and Celebration of Marriages was opened for signature on 14 March 1978 and entered into force for Australia upon its ratification as from 1 May 1991. The Hague Convention requires state parties to recognise a marriage lawfully entered into in a foreign state (whether or not they are Convention parties) and this provision was enshrined in Australian law by the Marriage Amendment Act 1985 introducing a new Part VA into the Marriage Act

⁴³ Ibid p. 2006

⁴⁴ House of Representatives, *Hansard*, 18 August 1960, p. 229

⁴⁵ House of Representatives, *Hansard*, 19 May 1960, p.2006

1961. Of interest in this debate is that among the limited number of fully ratifying parties is The Netherlands where same-sex marriage is now “lawful”.

It is of course true that the Convention (Article 14) allows State parties to refuse to recognise foreign marriages where they are “manifestly incompatible with its public policy (“ordre public”).”

Again, this Convention ratification and legislation was intended to be expansive of the categories of people able to have their marriages recognised, beneficial in effect and debated/passed on a non-party/partisan basis. There was no opposition to the 1985 Bill.

Family Law Bill 1974

In a major revision of Australian divorce and family law, the Labor Government introduced legislation to replace the numerous grounds on which divorce was available under the Matrimonial Causes Act with a single ground – the “irretrievable breakdown” of the marriage. A number of other matters of family law were reformed under this Act and the Family Court of Australia established as the principal judicial body overseeing and deciding such matters.⁴⁶

This legislation was dealt with on a non-party/partisan basis and passed in the Senate by 49 votes to 7 and without division at all in the House of Representatives.

Family Law Amendment Bill 1983

The original Family Law Act 1975 was subject to major examination by the Parliamentary Joint Select Committee on the Family Law Act which recommended a significant number of amendments in the light of the Act’s operation over the previous eight years. The Government accepted in whole or in part 37 of these which were incorporated into the 1983 Amendment Bill. Again, there was an entirely non-party/partisan approach to the legislation which passed in both the House and the Senate without division.

Thus, all Commonwealth legislation from the earliest days until 2004 was characterised by the key features of being beneficial and expansive in nature; not seeking to give any (let alone a narrow) definition of ‘marriage’ and debated/voted upon in an entirely non-party/partisan manner.

This was to change in 2004 with the introduction of the first narrow and overtly discriminatory set of provisions in Australian marriage legislation.

Marriage Amendment Bill 2004

⁴⁶ Senate, *Hansard*, 13 December 1973, p. 2827, also Senate, *Hansard*, 3 April 1974, p. 640

This Bill was forced through the Parliament on a party-vote (under the whip) in order to do three things: (1) to define marriage under the Marriage Act in terms of the definition given by Lord Penzance (which in our Submission was always wrong in law and is a purely religious definition in terms of Judeo-Christian values); (2) prohibit same-sex marriages contracted overseas being recognised in Australia and (3) to terminate any such claims for recognition on foot at the time of the enactment of the legislation.

The potential use of Part VA of the Marriage Act, enacted without demure in 1985, was thereby closed off to same-sex couples.

Attorney General Ruddock's perfunctory second reading speech⁴⁷ – of a few hundred words – makes no attempt to disguise the fact that for the first time in the history of Australian marriage legislation, Parliament:

§ Enacted legislation deigned to be **completely discriminatory** against a minority of Australians on no other basis than their sexual orientation and

§ To do so on the basis of **enforced party-disciplined** voting (in which the Australian Labor Party was completely compliant.)

Never before in the history of Australian marriage or family law was the Parliament asked to enact discriminatory legislation – restricting and not expanding marriage rights, and doing so in a way which did not allow the free expression of the consciences of Members or Senators in the major parties.

We regard this as not only discriminatory (a matter which cannot be argued given the expressed terms of Attorney General Ruddock's speech and the attached Explanatory Memorandum), but shameful.

The clearly discriminatory nature of this measure was evident in June 2006 when, on the advice of Attorney General Ruddock, the Governor General signed a disallowance of the Civil Unions Act passed by the Legislative assembly of the Australian Capital Territory⁴⁸, on the basis that such civil unions were (in the words of Prime Minister Howard) "*an attempt to equate civil unions with marriage*"⁴⁹ and that this was unacceptable to the federal government.

A similar threat was issued by the Rudd government when the ACT again passed measures to formalise civil partnerships through a legally binding ceremony.⁵⁰

Although the position has moved on regarding various form of relationship recognition under state and territory laws, and although new legislation has revised

⁴⁷ House of Representatives, *Hansard*, 24 June 2004, p.31459

⁴⁸ Stafford, Annabel: "Commonwealth quashes ACT in battle over civil unions law", *The Age*, 14 June 2006

⁴⁹ Quoted in Malden, Samantha: "Howard pushes to ban same-sex unions", *The Australian*, 7 June 2006

⁵⁰ "Homosexuals get civil ceremonies", *The Australian*, 12 November 2009

the power of the federal parliament to disallow ACT legislation⁵¹, the point at issue remains that these actions by the federal government in 2006 clearly indicated a public policy of positive discrimination against same-sex couples which your Submitters would invite the Senate Committee to regard as no longer appropriate.

⁵¹ In August 2011 Parliament passed Senator Bob Brown's (Australian Greens) *Australian Capital Government (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill* which removed Ministerial veto over ACT legislation and left such power in the hands of the Parliament itself – as is provided under s. 122 of the Constitution. In the debate the Opposition specifically attempted to amend the Bill to make clear it could not refer to any matters of same-sex marriage. Such amendments were defeated.

CHAPTER 4 :

SUPPORT FOR SAME-SEX MARRIAGE: OLD AND NEW

Some same-sex marriage opponents pretend that marriage equality is only promoted by a minority of gay and lesbian activists and radical fringe elements, with passive support from the inner-city café latte set, most of whom are in government jobs, arts grant recipients or unemployed. Such is their willingness to resort to stereotyping.

The reality is that supporters of marriage equality are drawn from all sections of the community, as the submissions the 2009 Senate inquiry demonstrate. They include people working in a wide variety of occupations, with diverse cultural backgrounds, and lived experience. Among them are people faith as well as non-believers and people with a range of political views. Many would readily fit into the proverbial mainstream.

In some cases, support for same-sex marriage has not come easily. For some, it as involved rethinking long held views. Many who have come to support marriage equality have done so after thinking deeply about the issue for the first time, and realising that their earlier views were shaped by conventional wisdom, or an unanalysed set of accepted beliefs.

The Media

The first major publication to write editorially in favour of same sex marriage was *The Economist*, hardly a left wing or radical rag on 6 January 1996. Its lengthy editorial concluded:

*“In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical. That is a sound argument for not pushing along change precipitously. Certainly it is an argument for legalising homosexual marriage through consensual politics..., rather than by court order. But the direction of change is clear. If marriage is to fulfill its aspirations, it must be defined by the commitment of one to another for richer or poorer, in sickness and in health – not be the people it excludes.”*⁵²

The Economist returned to the fray in 2004 when it featured “The Case for Gay Marriage” as its cover story replete with two wedding-attired gay men on the cover. Its editorial once again made the case with great clarity:

“The case for allowing gays to marry begins with equality, pure and simple. Why should one set of loving, consenting adults be denied a right that other such adults

⁵² “Let them Wed” editorial, *The Economist*, 6 January 1996 p.15

have and which, if exercised will do no damage to anyone else? Not just because they have always lacked that right in the past, for sure: until the late 1960s, in some American states it was illegal for black adults to marry white ones, but precious few would defend that ban now on the grounds that it was 'traditional'. Another argument is rooted in semantics: marriage is the union of a man and a woman, and so cannot be extended to same-sex couples. They may live together and love one another, but cannot on this argument be 'married'. But that is to dodge the real question – why not? – and to obscure the real nature of marriage, which is a binding commitment, at once legal, social and personal, between two people to take on special obligations to each other. If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so, while other adults, equivalent in all other ways, are allowed to do so? But marriage is about children, say some: to which the answer is, it often is, but not always, and permitting gay marriage would not alter that.....Marriage as it is commonly viewed in society, is more than just a legal contract. Moreover to establish something short of real marriage for some adults would tend to undermine the notion for all. Why shouldn't everyone, in time, downgrade to civil unions? Now that would really threaten a fundamental institution of society.”⁵³

On 5 March 2012, that veritable thunderer, *The Times* of London editorialised that gay marriage:

“would enrich the institution of marriage, enhance social stability and expand the sum of human happiness. It is a cause that has the firm support of The Times.”⁵⁴

The Times editorial is most thoughtful in its analysis of the potential impact of same-sex marriage on social norms and values, and recognises the concerns expressed by responsible church leaders. After discussing those concerns, it concludes:

“Reforms to marital law need to be informed by a sense of history, lest they give rise to unintended and damaging consequences. Only in the past generation has the principle of same-sex marriage gained widespread support. It is not a frivolous criticism that the legitimacy of marriage and the social cohesion it provides might be damaged if the law is rewritten without regard for how most people understand an historic institution. The objection is misguided, even so. British society has in 45 years gone from decriminalising homosexuality to introducing civil partnerships. That legislative and cultural distance is immense. Only one of the reasons that such reforms enhance the quality of life is their expansion of personal liberty. Recognising the validity of homosexual relationships serves the public good too. It has encouraged gay couples the commit to enduring partnerships, in which many show a devotion, care and disinterested love that do far more to create ordered domesticity that government programs could ever achieve. So far from damaging marriage, expanding it to same-sex couples shores it up. Stable gay relationships are part of national life. If

⁵³ “The case for gay marriage” Editorial, *The Economist*, February 28 – March 5, 2004 p. 11

⁵⁴ “The Times backs gay marriage” Leader Article, *The Times*, 5 March 2012

marital law cannot accommodate them, the purpose of marriage will eventually be brought into question."⁵⁵

Within days, *The Guardian* was editorialising:

*"The argument that gay marriage undermines straight marriage is as unconvincing as it is insulting – as if the currency of marriage is devalued by extension to those who find love with members of the same sex."*⁵⁶

The need for same-sex marriage has been explored on the other side of the Atlantic.

In the *New Yorker*, Adam Haslett wrote:

"These days, few would disagree that respect and affection are central to a successful marriage. But most of us would add another ingredient, which had long been viewed skeptically as a reason to wed: romantic love. Burton, in his "Anatomy of Melancholy"—the most widely read book of the seventeenth century after the Bible—reflected a common view when he described marriage as one of several "remedies of love," which was itself an illness to be overcome. Not until the confessional diaries and novels of the late eighteenth and early nineteenth centuries started to influence bourgeois notions of what Jane Austen called "connubial felicity" did romance begin its steady ascent in the marital realm. Today, needless to say, the most respectable reason you can give for getting married is that you have fallen in love. We have managed to create an ideal of matrimony that combines both lifetime companionship and the less stable but more intoxicating pleasures of romantic ardor.

*Such great expectations of marital happiness belong to a larger history of the Western emphasis on the self. The philosopher Charles Taylor, in an examination of how our attitude toward interior life has changed over the past five hundred years, argues that the trend line runs in one direction: from a self-understanding gained from our place in larger entities—such as a chain of being or divine order—toward purpose discovered from within, through what we consider to be authentic self-expression. This is the distance Western culture has travelled from the church confessional to the therapist's couch. In turn, the choice of whom to marry has become less about satisfying the demands of family and community than about satisfying oneself. When you add the contraceptive and reproductive technologies that have separated sex from procreation, what you have is a model of heterosexual marriage that is grounded in and almost entirely sustained on individual preference. This is a historically peculiar state of affairs, one that would be alien to our ancestors and to most traditional cultures today. And it makes the push for gay marriage inevitable."*⁵⁷

⁵⁵ idem

⁵⁶ "Gay marriage; torn asunder from reality", *The Guardian*, 8 March 2012

⁵⁷ Haslett, Adam: "Love Supreme – Gay nuptials and the making of modern marriage", *The New Yorker*, 24 May 2004

Neither of us would normally expect to be quoting Derryn Hinch in our favour – except on this occasion.

“My (previous hostility to gay marriage was) irrational and discriminatory. And such discrimination is illegal because you cannot discriminate on the grounds of sex, religion or race. It is also morally reprehensible. I also found my justifications increasingly hollow and unconvincing, even to me. It took me back to the days when my mother couldn’t satisfactorily answer a question. After a third “Why?” she would respond: “Because it just is. That’s why.” And that’s about the best the opponents of gay marriage can come up with in 2010: it just is.”⁵⁸

The Church

Views are even changing within the Anglican Church.

The new Dean of St Paul's Cathedral has called on the Church of England to embrace gay marriage. The Very Rev Dr David Ison, in the first week of March this year said that the church should welcome gay people wanting to take on the virtues of marriage, such as faithfulness.

He was quoted as saying:

“We need to take seriously people's desire for partnership and make sure that the virtues that you see in married relationships are available to people who are gay.”

He went on to claim that there was a problem of "word definition" about gay marriage because of the history and the tradition of the church. He added that it was more helpful to talk of "Christian marriage" than homosexual or heterosexual unions saying:

“You can regard two Christian gay people as wanting to have the virtues of Christian marriage. For Christian gay people to model that kind of faithfulness, in a culture which, historically, has often been about promiscuity, is a very good thing to do.”

Perhaps most tellingly he is reported as saying: "Marriage doesn't belong to the Church."⁵⁹

In his previous position as dean of Bradford Cathedral, Ison conducted ceremonies to affirm and pray for gay couples civil partnerships. He said he would be happy to do the same at St Paul's.

The Dean is not alone. On 3 February 2012, the new Bishop of Salisbury, the Rt Rev Nick Holtam spoke out in support of gay marriage. He stated:

⁵⁸ “Why it was wrong of me to oppose gay marriage”, *The Australian*, 16 July 2010

⁵⁹ “Embrace gay marriage, says new dean of St Paul’s”, *The Guardian*, 8 March 2012

“I think that same-sex couples that I know who have formed a partnership have in many respects a relationship which is similar to marriage and which I now think of as marriage.”

Pertinently he added: “And of course now you can’t really say that a marriage is defined by the possibility of having children. Contraception created a barrier in that line of argument. Would you say that an infertile couple who were knowingly (sic) infertile when they got married weren’t in a proper marriage? No you wouldn’t.” Children he said should not be “the single defining criteria” of marriage.⁶⁰

It should also be noted that a number of committed Christians appeared before the previous Senate Committee to express their support for same-sex marriage⁶¹ and this support has been long-standing for many such people.⁶²

We also note the Submission from Very Reverend Peter Catts, Dean of St John’s Anglican Cathedral, Brisbane, to this Committee in support of the legislation under consideration⁶³.

We are among those who welcome the repentance of those who, having considered all the evidence, are prepared to change their minds.

Political leaders

It is not only church people who are prepared to examine their beliefs.

Former Victorian Premier Jeff Kennett is among those who have experienced a change of heart. Earlier this year he declared:

*“As long as you don’t break a law against me, why should I allow sexuality to prevent you from living your life as you want to? If people are living a happier life in a gay relationship which ends up in marriage, then why would I in any way want to prevent it?”*⁶⁴

This brings him into line with the position taken some time before by former NSW Liberal Premier Nick Greiner⁶⁵ and more recently by the new Queensland Premier Campbell Newman.⁶⁶

Perhaps the world’s most prominent conservative leader, British Prime Minister David Cameron has set his Government on a course to achieve gay marriage by 2015,

⁶⁰ “Bishop of Salisbury backs gay marriage”, *Pink News*, 3 February 2012

⁶¹ Senate Committee report at 3.10 / 3.12

⁶² Muriel Porter: “Highest praise for nuptials – Not all Christians oppose gay marriage”, *Sydney Morning Herald*, 6 June 2008.

⁶³ Submission number 72

⁶⁴ “Kennett flips on gay marriage” *SX magazine*, 12 March 2012, p. 4

⁶⁵ “Greiner dismisses same-sex marriage concerns”, *Sydney Morning Herald*, 13 April 2011

⁶⁶ Newman’s personal support for gay marriage was made an object of attack and ridicule in advertisements broadcast by the Bob Katter’s Australia Party during the election campaign. “Only in Queensland? No actually.” *Sydney Morning Herald* (14 March 2012) noted “Mr Newman’s support for gay marriage is shared by a majority of Australian voters.”

drawing the not unexpected hysteria of some church leaders rightly described as being merely designed to “whip up moral panic.”⁶⁷ Cameron’s speech to his Party Conference in 2011 was unequivocal:

*“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 legalizing gay marriage, and to anyone who has 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.”*⁶⁸

Perhaps most lucidly, former Republican Michael Bloomberg, now Independent Mayor of New York, gave a powerful speech on gay marriage on 26 May 2011. He said:

“Today, a majority of Americans support marriage equality — and young people increasingly view marriage equality in much the same way as young people in the 1960s viewed civil rights. Eventually, as happened with civil rights for African-Americans, they will be a majority of voters. And they will pass laws that reflect their values and elect presidents who personify them.

“It is not a matter of if — but when.

“And the question for every New York State lawmaker is: Do you want to be remembered as a leader on civil rights? Or an obstructionist? On matters of freedom and equality, history has not remembered obstructionists kindly.

“Not on abolition.

“Not on women’s suffrage.

“Not on workers’ rights.

“Not on civil rights.

“And it will be no different on marriage rights.

“So the question really is: So, why now? Because this is our time to stand up for equality.

“It is my hope that members of the State Senate majority will recognize that supporting marriage equality is not only consistent with our civic principles — it

⁶⁷ Exactly as Sydney Anglican Archbishop Peter Jensen has tried to do, writing in the Church’s newspaper *Southern Cross* that allowing same-sex marriage could “lead to the acceptance of polygamy and incest”. See *Sydney Morning Herald*, 11/12 June 2011. This line has been repeated in a letter circulated in March 2012 by six Catholic Bishops in Victoria designed to force parishioners to write to this Senate Committee opposing gay marriage because next “it might be polygamy”. See “Catholic Church marshalls anti-gay army”, *News.com.au*, 30 March 2012.

⁶⁸ Cameron, David: *Speech to Conservative Party Annual Conference*, Manchester, October 2011

is consistent with conservative principles. Conservatives believe that government should not intrude into people's personal lives — and it's just none of government's business who you love!

"Conservatives also believe that government should not stand in the way of free markets and private associations — including contracts between consenting parties. And that's exactly what marriage is: a contract, a legal bond, between two adults who vow to support one another, in sickness and in health.

"There is no State interest in denying one class of couples a right to that contract. Just the opposite, in fact. Marriage has always been a force for stability in families and communities — because it fosters responsibility. That's why conservatives promote marriage — and that's why marriage equality would be healthy for society, healthy for couples and healthy for children.

"Right now, sadly, children of same-sex couples often ask their parents: 'Why haven't you gotten married like all our friends' parents?' That's a heartbreaking question to answer.

"And it's an early expression of the profound principle that sets our country apart: that all people are created equal, with equal rights to life, liberty, and the pursuit of happiness. That is the American dream — but for gay and lesbian couples, it is still only that: A dream.

"The plain reality is, if we are to recognize same-sex and opposite sex couples as equals, that equality must extend to obtaining civil marriage licenses. Now, some people ask: Why not just grant gay couples civil unions?

"That is a fair and honest question. But the answer is simple and unavoidable: Long ago, the Supreme Court declared that 'separate but equal' opportunities are inherently unequal.

"In our democracy, near equality is no equality. Government either treats everyone the same, or it doesn't. And right now, it doesn't.

"Tonight, two New Yorkers who are in a committed relationship will come home, cook dinner, help their kids with their homework and turn in for the night. They want desperately to be married — not for the piece of paper they will get. Not for the ceremony or the reception or the wedding cake. But for the recognition that the lifelong commitment they have made to each other is not less than anyone else's and not second-class in any way. And they want it not just for themselves — but for their children. They want their children to know that their family is as healthy and legitimate as all other families.

"That desire for equal standing in society is extraordinarily powerful and it has led to extraordinary advances in American freedom.

"It has never been defeated.

"It cannot be defeated.

"And on marriage equality, it will not be defeated."⁶⁹

⁶⁹*"Mayor Bloomberg delivers major address on urgent need for marriage equality", Press Statement and Text, City of New York, 26 May 2011*

CHAPTER 5 :

INTERNATIONAL RECOGNITION OF SAME-SEX MARRIAGE

Internationally, marriage equality is a reform whose time has come and is coming.

Same-sex marriage is becoming increasingly accepted and normative throughout Europe; in large parts of the United States, increasingly in Latin and South America, and even gradually in Asia. It is now lawful in ten countries, including countries with large Catholic populations.

The United Kingdom, among others, is likely to join them in the next five years. Many other countries have provided partial recognition of same-sex relationships.

These developments will increasingly result in Australians with dual citizenship being in the dubious position of being single in Australia and married in their other country.

Same-sex marriage

CANADA: Although not the first country to pass national laws recognising same-sex marriage, the marriage of two gay men in the Metropolitan Community Church in Toronto on 14 January 2001 precipitated the Canadian Courts into considering this question. After lengthy hearings at provincial and national levels, the Supreme Court of Canada ruled in 2004 that same-sex marriage had constitutional validity. The Canadian Parliament subsequently passed the *Civil Marriage Act* which came into effect on 20 July 2005.

THE NETHERLANDS: became the first country to officially legislate to recognise same-sex marriage as of 1 April 2001. The Act passed originally in September 2000 and also extended the right to adopt to such couples.⁷⁰

BELGIUM: the law was passed on 30 January 2003, although the right for “legal co-parenting” only took effect in April 2006.

SOUTH AFRICA: enacted legislation following a Supreme Court ruling and this came into effect on 30 November 2006. Interestingly gay couple adoption had been in place since 2002.

NORWAY: legislation took effect on 11 June 2008 by way of a “gender neutral” marriage bill which also provided for gay couple adoption and lesbian access to state-funded IVF treatment.

⁷⁰ This law also extends to the Netherland’s possessions in the Caribbean.

SWEDEN: took a similar course with gender-neutral marriage laws in April 2009. Same-sex couple adoption was permitted from June 2002. In 2007 the Swedish Lutheran Church approved the recognition of same-sex partnerships within congregations, although without using the term “marriage”. From 1 November 2009, following approval by over 70% of the Synod, the Lutheran church voted to permit gay marriages to be carried out in its congregations.

PORTUGAL: voted to approve gay marriages as from 8 January 2010, although the same legislation declined to approve gay couple adoption rights.

ICELAND: followed the other Scandinavian countries by enacting gender-neutral marriage laws which took effect on 27 June 2010 after a unanimous vote in the Althing. One of the first couples to be married under the new Icelandic law was the Prime Minister and her partner.

ARGENTINA: provided for same-sex marriage as from 5 July, 2010 (33/27 in the Upper and 125/109 in the Lower House) despite vigorous opposition from the Catholic Church, making it the first South American country to recognise such marriages.⁷¹

SPAIN: became the third country to recognise same-sex marriages with passage of legislation in the Cortes Generales (187/147) on 30 June 2005 (commencing 3 July 2005). Same-sex couple adoption was also approved. The legislation was vigorously opposed by the Catholic Church. The legislation was part of a package of laws which also addressed other issues of gender-based violence⁷². In support of the legislation, Prime Minister Zapatero told the Cortes:

“We are not legislating ... for people far away and not known to us. We are enlarging the happiness of our neighbours, our co-workers, our friends and our families. At the same time we are making a more decent society, because a decent society is one that does not humiliate its members. Today Spanish society answers to a group of people who, during many years, have been humiliated, whose rights have been ignored, whose dignity has been offended, their identity denied and their liberty oppressed. Today’s Spanish society grants them the respect they deserve, recognises their rights, restores their dignity, affirms their identity and restores their liberty..... It is true that they are only a minority, but their triumph is everyone’s triumph..... Their victory makes us all better people.....there is no damage to marriage or the concept of family in allowing two people of the same sex to get married. To the contrary, what happens is that this class of Spanish citizens gets the potential to organise their lives with the rights and privileges of marriage and family. There is no danger to the institution of marriage, but precisely the opposite.”⁷³

⁷¹ “Argentina defies clergy on gay marriage”, *Wall Street Journal* 6 July 2010

⁷² A government spokesperson described this as part of bringing the power of the state to bear on eradicating “criminal machismo”. Ross-Thompson, Emma: “Spanish gays rejoice as marriage legalised”, *Sydney Morning Herald* 1 July 2005

⁷³ Text quoted from Eskridge and Spedale: *op cit.* p. 85

Partial and possible recognition

Apart from national laws recognising same-sex marriage there are a variety of other jurisdictions in which such unions are legalised in one form or another.

ISRAEL: after a ruling by the Supreme Court, Israel now extends recognition of same-sex marriages to couples who have been lawfully married overseas and now reside in Israel, which does not itself have such legislation.

MEXICO: authority over marriages lies with the States in Mexico. Despite vigorous opposition from the Catholic Church, the legislature of the Federal District of Mexico City (akin to the ACT or the District of Columbia, USA) voted 39/20 to approve gay marriage. This law was challenged in the Supreme Court which both upheld its validity and ruled on 10 August 2010 that other States must give recognition to same-sex marriages performed elsewhere in Mexico under state law.⁷⁴

BRAZIL: has a position akin to that of Mexico where marriages performed in a state which has authorised them must be recognised throughout the country. The state of Alagoas authorises such marriages. In May 2011 the Brazilian Supreme Court ruled unanimously that partners in same sex unions had the same legal rights as a man and woman in a marriage.

DENMARK: has announced (October 2011) that legislation for full marriage rights for same-sex couples will be brought forward year to replace the current system of “legally recognised” same sex unions which was enacted as the first in the world in 1989. It is expected to be enacted in the first half of 2012.

FINLAND: has moved similarly with such legislation now before its Parliamentary Legal Affairs Committee for possible enactment this year.

COLOMBIA: the Supreme Court has ruled (July 2011) that if the legislature does not enact same-sex marriage laws such couples will be automatically granted marriage rights on 20 June 2013.

LUXEMBOURG: has announced plans to legislate for same-sex marriage.

GERMANY: In June, 2011, the Senate of Hamburg, following CDU/CSU losses in state elections around the country, announced its intention to introduce a same-sex marriage bill in the Bundesrat, the federal representation of the German lander.

NEPAL: the Nepalese supreme court has ruled in favour of same-sex marriage and the government has agreed to bring forward such legislation within the framework of a new Constitution currently being drafted and due for completion by 31 May 2012.

NEW ZEALAND: does not have legislation supporting same-sex marriages but in December 2005 their Parliament rejected a Bill to specifically deny them recognition.

⁷⁴ “We do: City approves gay marriage”, *Sydney Morning Herald*, 23/24 December 2009. See also “Supreme Court rules on Gay Marriage”, *Time*, 23 August 2010 p. 8

Since 2005 a Civil Union Act has extended all married rights (other than the term) to same-sex couples.

UNITED STATES OF AMERICA:

As might be expected there is great variation in the approach to same-sex marriages in the United States where the regulation of marriage is a matter for the individual States. To date same-sex marriages have been given legislative approval in:

- § Massachusetts (May 2004)
- § Connecticut (November 2008)
- § Vermont (September 2009)⁷⁵
- § New Hampshire (January 2010)
- § Iowa (March 2011)
- § District of Columbia (DC) (March 2011)
- § New York (June 2011)
- § Washington (February 2012)
- § Maryland (March 2012)

In addition the States of *New Jersey* and *Rhode Island* provide for the recognition of such marriages performed in other States. The New Jersey legislature has voted for same-sex marriage (February 2012) but this was prevented by the veto of the State Governor.

California has a complex history in which gay marriage was originally recognised under an Ordinance of the City of San Francisco. This was challenged and in 2008 the State legislated in support of gay marriage. However later that year this legislation was overturned by referendum (so-called “Proposition 8”). In turn the California Courts ruled that Proposition 8 itself was unconstitutional and this ruling has been upheld by the US Court of Appeals for the Ninth Circuit. At this stage the issue remains in legal limbo.

Some States have passed specific laws to ban gay marriage and some State Constitutions have been so amended. Section 1 of Article 6 of the United States Constitution requires each State to give “full faith and credit to the public acts, records and judicial proceedings of every other State” but to date State laws which would not do this in relation to marriages lawfully entered into in other States has not been tested judicially.

Some American commentators have speculated that should this matter reach the United States Supreme Court that same-sex marriage would be upheld on the basis of the Court’s reasoning in *Loving v Virginia*. This remains purely speculative at this stage. Similarly the Supreme Court will no doubt be asked to rule in relation to the federal Defence of Marriage Act (DOMA) which seeks to ban same-sex marriages and deny “full faith and credit” recognition. In a recent case (July 2010), key parts of

⁷⁵ An interesting study of the political and personal battles involved in securing passage of same-sex marriage legislation in Vermont may be found in Moats, David: *Civil Wars – a Battle for Gay Marriage* (Harcourt, Orlando, 2004)

this legislation have been ruled unconstitutional by a lower federal court and is now on appeal.

UNITED KINGDOM:

Under British (i.e. English and Welsh) law same-sex marriage is not permitted although civil unions have been in place since 2005. As already noted, Prime Minister Cameron has announced (September 2011) his government's support for gay marriage to be enacted by Parliament prior to the next general election and has commenced a major system of "national consultation" on the issue. The consultation, announced by Equalities Minister Lynne Featherstone to start in March 2012, covering civil marriage but not religious weddings would allow for the matter to be legislated by 2015.⁷⁶

A similar process has been under way in Scotland (which has a different legal system. Their consultation period closed in December 2011 but the Scottish Government (which has an absolute majority in their Assembly) has stated its support for such a measure.

⁷⁶ "Gay and Lesbian marriage to be considered in spring legal review", *The Guardian*, 17 September 2011

A legal conundrum

The Committee will no doubt be mindful of the pressures which will increasingly be felt by Australians who enter in same-sex unions overseas (especially after 2015 in the United Kingdom) and find themselves discriminated against upon return to the land of their birth or citizenship. This could extend to their being denied the right to bring their married partner back with them: just as Australian servicemen were denied the right to bring their Japanese wives back to Australia after the Second World War.

The Committee may care to turn its mind to this conundrum:

Two Australian citizens (either by birth or naturalisation), both of whom are also British citizens (again either by birth or by right of their parent's birth) and who hold dual nationality (as they are entitled to) get married in the United Kingdom after 2015. They are recognised as "married" when they are British but not recognised as "married" when they are Australian.

Thus like Schrodinger's proverbial cat they are both one thing and the opposite (although not quite dead and alive) at the very same time.

Do members of the Committee really want make a recommendation which will lead to this?

CHAPTER 6:

OPPOSITION TO SAME SEX MARRIAGE

Religious objections

Much of the opposition to same sex marriages comes from the churches, religious, quasi-religious organisations and their adherents. These include organisations which may not be explicitly religious, but who rely upon strong connections with the churches, particularly the Christian denominations. Certainly a vast majority of submissions to the 2009 Senate inquiry opposing same sex marriage were from organisations and individuals with religious and predominantly Christian affiliations.

We fully respect the right of people of faith to argue their case based on their faith. We particularly respect those who explicitly acknowledge that their opposition to same sex marriage is based on the teachings of their church or their reading of scripture.

We acknowledge the significance of marriage in many faiths and support their right to continue to perform marriages according to their teachings and rituals. We equally support the right of the various faiths to determine who they marry and in what circumstances. As we have noted earlier, the *Marriage Act 1961* guarantees these rights. The Marriage Equality Bills introduced into the House of Representatives by Adam Bandt and Stephen Jones provide additional guarantees for those Ministers of Religion who do not wish to perform same sex marriages.

We are concerned however, that these provisions will not satisfy all faith adherents. At best, this may be because they fail to make the distinction between marriage as a religious sacrament and as a civil institution. At worst, we fear that they wish to impose their teachings and beliefs upon people who not only do not adhere to those teachings or beliefs but strongly disagree with them.

This fear is strengthened by a concern that many of the churches and religious groups opposed to same sex marriage are overstating who they represent. We have noted in Chapter 2 the decline in adherence to organised religion and church attendance. This alone should raise questions about the authority of the church to retard the development of a civil institution.

There is evidence which suggests that the position taken by church leaders on same sex marriage (and indeed many other social and moral issues) may not enjoy the unanimous support of their congregations. There is also evidence that there are strong and sincerely held differences of opinion within church and religious organisations about these issues.

There is also evidence which suggests that the position taken by some churches may in fact have contributed to the decline in religious involvement. In a 2002 survey

which explored why people did not go to church, 35% gave the beliefs of churches as a reason, and 35% cited churches' "moral views".⁷⁷

Claire Pickering, a researcher with the Christian Research Association suggests that 'Moral values', as reason for non attendance, "may point to a perceived gap between the pertinent moral issues addressed by civil society and the church, and their official resolutions."

She writes:

"Churches have an important role in ethical discussions. However, the ways in which discussions have been undertaken and the decisions of churches have perhaps led to disengagement, and therefore, decline in attendance. In relation to divorce, abortion, homosexuality and women's rights, churches often entered broader dialogue late, and, following lengthy in-house debates, often made decisions quite different from public policies.

*"For example, abortion remains perceived as tantamount to murder in the Catholic Church, while many Protestant denominations have acknowledged abortion as being acceptable in some circumstances. The ordination of women is encouraged in many Protestant denominations, but disavowed by others, including the Catholic Church, despite significant movements towards the equality of women in broader society. **In addition, while many churches and denominations continue to disavow homosexuality or debate their official position, society has largely moved on and is engaging with other issues related to sexuality and gender, such as trans-sexual and gender variant rights.** This ethical plurality between and within religious institutions may be perceived by the wider population as confusing. **The stance of some churches on some issues contributes to criticism and the perception that the church is irrelevant to contemporary society.**"⁷⁸ (Our emphasis)*

Of equal concern is that the positions adopted by some in the church may be out of step with the broader community.

The Christian Research Association's senior research officer, Dr Philip Hughes, has found that Christians have strong and different opinions to most other people:

"These are mainly the issues about sexuality and about life. For example, close to 40 per cent of church attenders say that abortion and euthanasia can never be justified under any circumstances – compared with just 5 per cent of those people who never attend a church. Fifty-two per cent of church attenders say that sex before marriage is wrong, compared with just 6 per cent of those who do not attend church. And 77 per cent of church attenders say

⁷⁷ Bellamy, J., Black, A., Castle, K., Hughes, P. and Kaldor, P. 2002. *Why People Don't Go to Church*. (Adelaide: Openbook Publishers). pp. 12-15.

⁷⁸ Pickering, Claire "Factors in Declining Church Attendance" *Pointers*, Bulletin of the Christian Research Association June 2009. Volume 20, Number 2. p9

that sexual intercourse between adults of the same sex is wrong compared with 42 per cent of those who never attend a church.”⁷⁹

These differences are concerning, given that, as we demonstrated in Chapter 2 regular church attenders comprise only 16% of the population. Given this, we must ask whether the beliefs of this minority should dictate public policy, given that the continued expression of their beliefs can be guaranteed.

We agree with the comments of Tim Dick on this point when he writes:

*“The arguments in favour of fair marriage for all are well-traversed, conservative and powerful. There is no rational reason against it, only religion. Legally, it is an easy, quick legislative fix of changing the definition in the Marriage Act, and some minor consequential amendments. Politically, it is not even if a majority supports it. Marriage equality is not the victim of the tyranny of the majority. It is a victim of the **tyranny of a powerful minority** living in important electorates, a tyranny assisted by the ambivalence of some who would benefit from it. In a country with no bill of rights, the courts cannot uphold human dignity in the face of such prejudice.”⁸⁰ (our emphasis)*

The Unspoken Truth: It’s not about Marriage, it’s about Homosexuals

We would submit to the Committee that while a great deal of the opposition to same-sex marriage from religious groups and the mainstream Churches in particular is couched in terms of the “defence of traditional marriage” the truth is that the opposition lies far deeper. It lies in the intrinsic hostility and rejection of homosexuals and homosexuality by these religious organisations and their continuing hostility towards them.

(a) The Roman Catholic Church

The official position of the Catholic Church is set out in *Declaration on Certain Questions Concerning Sexual Ethics* in the following terms:

*“For according to the objective moral order, homosexual relations are acts which lack an essential and indispensable finality. In sacred Scripture they are condemned as a **serious depravity** and even presented as the sad consequence of rejecting God. This judgment of Scripture does not of course permit us to conclude that all those who **suffer from this anomaly** are personally responsible for it, but it does attest to the fact that homosexual acts are **intrinsically disordered** and can in no case be approved of.”⁸¹ (emphasis added)*

⁷⁹ Hughes, Philip Can Christians Make A Difference? Christian Faith and Society, downloaded from <http://crucible.ea.org.au/election/aCanChristians.htm>

⁸⁰ Dick, Tim : “Gay marriage – what would it really take?”, *Sydney Morning Herald*, 18 December 2010

⁸¹ Sacred Congregation for the Doctrine of the Faith: *Declaration on Certain Questions Concerning Sexual Ethics* 29 December 1975, (Franjo Cardinal Seper, Prefect) at para. 8

This doctrinal position is repeated in the statement issued by the Congregation for the Doctrine of the Faith in *On the Pastoral Care of Homosexual Persons*. There, the faithful are admonished to note that:

“3. *In the discussion which followed the publication of the Declaration [see above], however, an overly benign interpretation was given to the homosexual condition itself, some going so far as to call it neutral, or even good. Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency **ordered towards an intrinsic moral evil**, and thus the inclination itself must be seen as an objective disorder.*

7. *It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore **acts immorally**..... This does not mean that homosexual persons are not often generous and giving of themselves, but when they engage in homosexual activity they confirm within themselves a **disordered sexual inclination** which is essentially self-indulgent.*

9. *There is an effort in some countries to manipulate the Church by gaining the often well-intended support of her pastors with a view to changing civil statutes and laws. This is done in order to conform to those pressure groups’ concept that homosexuality is at least completely harmless, if not an entirely good, thing. Even when the practice of homosexuality may seriously threaten the lives and the well-being of a large number of people, its advocates remain undeterred and refuse to consider the magnitude of the risks involved. But the proper reaction to crimes committed against homosexual persons should **not be to claim that the homosexual condition is not disordered.**”⁸² (emphasis added)*

Even in the document *Non-discrimination against homosexual persons*, the faithful are reminded that:

“10. *‘Sexual orientation’ does not constitute a quality comparable to race, ethnic background, etc., in respect to non-discrimination. Unlike these, homosexual orientation is an objective disorder and evokes moral concern.*

11. *These are areas in which it is not unjust discrimination to take sexual orientation into account, for example, in the placement of children for adoption or foster care, in employment of teachers or athletic coaches, and in military recruitment.”⁸³*

Senators will no doubt be aware that in relation to adoption grounds in several Australian States this position has been rejected, and the Australian Parliament itself has legislated to proscribe discrimination against people on the basis of their sexual

⁸² Congregation for the Doctrine of the Faith: *Letter to the Bishops of the Catholic Church on the Pastoral Care on Homosexual Persons*, 1 October 1986, (Joseph Cardinal Ratzinger, Prefect). Cardinal Ratzinger is, of course, now Pope Benedict XVI.

⁸³ Clarifying Statement : *Non-Discrimination Against Homosexual Persons – Some Considerations Concerning the Response to Legislative Proposals*, Joaquin Navarro-Valls, Vatican Spokesman (30 May 1992, Daughters of St Paul, Vatican Translation, Boston)

orientation in areas of employment, including teaching (other than in religious schools) and the military.

Nevertheless this support for discrimination against homosexual persons remains the official teaching of the Catholic Church.

The Congregation for the Doctrine of the Faith has addressed the precise question before the Senate Committee in its statement *Considerations regarding proposals to give legal recognition to unions between homosexual persons*. Here the official position of the Church is set out more clearly than in some of the submissions from the Church or parts of its organisation formally made to the Committee. It states:

*“4. There are absolutely no grounds for considering homosexual unions to be in any way similar or **even remotely analogous** to God’s plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law. Homosexual acts ‘close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.’”⁸⁴*

*“7. ...Such unions are not abler to contribute in a proper way to the procreation and survival of the human race. Allowing children to be adopted by persons living in such unions would actually mean **doing violence to these children**.*

10. ... When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic lawmaker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral.”⁸⁵ (emphasis added)

The Catechism of the Catholic Church, the Declarations, Letters and Statements issued by the Congregation for the Doctrine of the Faith (especially under its Prefect Joseph Cardinal Ratzinger, now Pope Benedict XVI) are binding on Catholics in good standing. While individual Catholics may differ in the level of their adherence to Church teaching, the Church itself, as an institution (together with its associated bodies) is nevertheless bound to adopt this position.

That position is that homosexuality is a “moral disorder”, that homosexuals are “objectively disordered” and that homosexual practices constitute “an intrinsic moral evil.” In recent times, various Cardinals and Bishops of the Church have been recorded as saying that homosexuals “will never enter the kingdom of heaven”;⁸⁶ that there was a link of homosexuality to paedophilia⁸⁷ and that UNESCO had a

⁸⁴ *Catechism* of the Catholic Church no 2357. The *Catechism* at 2358 states that the “homosexual inclination” is “objectively disordered.”

⁸⁵ Congregation for the Doctrine of the Faith: *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, (3 June 2003), (Joseph Cardinal Ratzinger, Prefect)

⁸⁶ Javier Lozano Cardinal Barragan (retired head of the Vatican Council for pastoral assistance to Health Care Workers) news.ninesmn.com.au/world/979071 (3 December 2009)

⁸⁷ Tarcisio Cardinal Bertone (Vatican Secretary of State), *Sydney Morning Herald*, 16 April 2010

“programme for the next twenty years to make half the world population homosexual.”⁸⁸

It is thus hardly surprising that the Church would want to do all in its power to prevent homosexuals from gaining a legal right to be married and would seek (in pursuit of its faith objectives) to pressure parliamentarians to support their position.⁸⁹ What however is critical to note, is that it is not the defence of the institution of marriage per se which lies at the heart of the Catholic Church’s objections, but the far deeper hostility, condemnation and rejection of homosexual persons themselves being the rock upon which this particular interest is built.

Fortunately, this hostility, condemnation and rejection of homosexual persons is not shared by all Catholics. Prominent Catholics such as former NSW Premier Kristina Keneally and Sydney Lord Mayor Clover Moore MP have made submissions to this inquiry in support of marriage equality.

A study conducted by America’s Public Religion Research Institute, found that American Catholics had more tolerant attitudes on gay and lesbian issues than the church hierarchy.⁹⁰

- § Nearly three-quarters of Catholics favor either allowing gay and lesbian people to marry (43%) or allowing them to form civil unions (31%). Only 22% of Catholics say there should be no legal recognition of a gay couple’s relationship.
- § Nearly three-quarters (73%) of Catholics favor laws that would protect gay and lesbian people against discrimination in the workplace; 63% of Catholics favor allowing gay and lesbian people to serve openly in the military; and 6-in-10 (60%) Catholics favor allowing gay and lesbian couples to adopt children.
- § Less than 4-in-10 Catholics give their own church top marks (a grade of an A or a B) on its handling of the issue of homosexuality; majorities of members of most other religious groups give their churches high marks.
- § A majority of Catholics (56%) believe that sexual relations between two adults of the same gender is *not* a sin.

⁸⁸ Demetrio Fernandez, Bishop of Cordoba in a Boxing Day sermon stated: “The Minister for Family of the Papal Government, Cardinal Antonelli, told me a few days ago in Zaragoza that UNESCO has a program for the next 20 years to make half the world population homosexual.” Reported *Sydney Star Observer*, 13 February 2012

⁸⁹ For example Archbishop Denis Hart of Melbourne and five other Catholic Bishops in Victoria are writing to some 80,000 parishioners exhorting them to write to Parliament about the legislation now before this Committee.

⁹⁰ The survey results may be found at <http://publicreligion.org/newsroom/2011/03/catholics-more-supportive-of-gay-and-lesbian-rights-than-general-public-other-christians/>

(b) Anglican Church

The position of the Anglican Church is somewhat more difficult to assess. The world-wide Anglican Communion is essentially a federation of many different Anglican churches which encompasses from the liberal Episcopalian dioceses of the United States and profoundly conservative evangelical dioceses such as that of Sydney. To a greater or lesser extent there is some recognition of the primacy of the archbishop of Canterbury as *primus inter pares* but this does not stop some Anglican Provinces or Diocese being in open disagreement with him. Similarly, the ten-yearly meetings of the Lambeth Conference which are supposed to establish the world-wide churches' position on major issues are often disregarded by some Provinces and even occasionally boycotted.

The Church of England in England itself was a major ally of liberal parliamentarians in the process of homosexual law reform. In 1957 the report of the Wolfenden Committee⁹¹ proposed the decriminalisation of homosexuality in the United Kingdom. The Government itself took no steps to implement its recommendations, leaving the process of law reform in the hands of Private Members Bills. The Bill (Sexual Offences Bill 1965) in the House of Commons was introduced by Leo Abse⁹² and in the Lords by Lord Arran and on a non-party voting basis was passed into law in July 1967.

In the House of Lords, the then Archbishop of Canterbury (Lord Geoffrey Fisher) was one of the co-sponsors of the Arran Bill and in the division all seven Lord Bishops of the Church of England voted in support of its passage and none against. Indeed

*“The leading opponent of reform, Lord Dilhorne blamed the bishops for the failure of his crusade.”*⁹³

Of course this is merely a reflection of the attitude of the Anglican Church to the question of secular law reform. It has not prevented the Anglican Church, on a world-wide basis and in many of its Provinces becoming deeply divided over the question of the role of individual homosexual men and women within the Church and in particular their capacity to join the Ministry.⁹⁴

⁹¹ Home Office: *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, Cmnd 247)

⁹² Interestingly, the Abse Bill for homosexual law reform was supported in the vote by the new MP Mrs Margaret Thatcher

⁹³ The role of the Church in homosexual law reform is discussed at length in Barber, M; Taylor S; Sewell, G : *From the Reformation to the permissive society ; a miscellany in celebration of the 400th anniversary of Lambeth Palace Library* (Church of England Record Society.18, Boydell and Brewer, Suffolk, 2010) p. 667

⁹⁴ Bates, Stephen: *A Church at War – Anglicans and Homosexuality* (I B Tauris, London, 2004). In recent years there has been a major schism in the Church in England over the possible appointment of Jeffrey John to the position of Bishop of Southwark – his appointment vetoed by the Archbishop of Canterbury see Bates, S : “Rowan Williams under siege over gay bishop veto”, *The Guardian*, 8 July 2010 and his recent response see Gledhill, R: “Cleric slams church’s gay stance”, *The Times*, 14 March 2012.

Responses have ranged from the acceptance and appointment of openly gay Bishops, such as Gene Robinson in the Episcopalian Church in the United States⁹⁵ to the virulent condemnation of all homosexuals by Archbishops such as Peter Akinola of Nigeria. Within Australia, the attitudes of leading church figures such as the former Primate, Archbishop Peter Carnley⁹⁶ and the current Archbishop of Sydney Peter Jensen are at polar extremes.⁹⁷

This in turn has led to submission from the Anglican Church in relation to homosexual couple's right to marry varying from outright rejection on both theological and sociological grounds to actual support of this reform⁹⁸. The Church of England in the United Kingdom has already expressed its opposition to Prime Minister Cameron's plans to legalise homosexual marriage.

What is relevant to the Senate Committee, we submit, is that the position of the Church of England on the fundamental question of the moral status of homosexual persons, and hence the question of their legal rights in a secular society is far more open and fluid and needs to be appreciated within the context of a history generally supportive of homosexual law reform.

“The union of a man and a woman to the exclusion of all others, voluntarily entered into for life”

This is the definition of marriage which was formally legislated in Australia by the Marriage Amendment Act 2004. It largely repeats the formulation originated by Lord Penzance in 1866 and which entered the common law. Yet many opponents of same sex marriage insist that this definition of marriage is timeless, absolute and immutable, and in some cases, God given. It therefore not only should not, but cannot be changed.

As we will show, the history of marriage and social reality suggest otherwise.

Henry Finlay points out that:

“... in early pre-Christian thought, the law relating to marriage, of which divorce was one aspect, was regarded as ‘a private or lay contract’ and its dissolution was therefore freely allowed.”⁹⁹

⁹⁵ Adams, Elizabeth : *Going to Heaven – the Life and Election of Bishop Gene Robinson* (Soft Skull Press, Brooklyn, NY, 2006)

⁹⁶ Carnley, Peter: *Reflections in Glass* (Harper Collins, Sydney, 2004) Carnley ordained Australia's first openly gay minister in 1992. Wilson, S: “Anglicans ordain openly gay priest”, *The Australian*, 27 August 1992

⁹⁷ The Evangelical position is set out in Diocese of Sydney, *Care of homosexuals by the Local Church*, (May 2000)

⁹⁸ See submission to this inquiry by Very Reverend Dr Peter Catt, Dean of St John's Cathedral, Brisbane

⁹⁹ Finlay, *op cit* p2 – Finlay references GE Howard, *A History of Matrimonial Institutions*, New York, Humanities Press 1904, Vol 2 p12 and Chapter XI generally.

It is perhaps worthwhile remembering that the Christian Church came to have a role in the regulation/recognition of “marriage” quite late in its history. As Wolfson observes:

*“..... the Catholic Church had nothing to do with marriage the during the church’s first one thousand years; marriage was not yet recognized officially as a Catholic sacrament, nor were weddings then performed in churches. Rather, marriage was understood as a dynastic or property arrangement for families and the basis social unit, households, (then often extended families or kin, often including servants and even slaves).”*¹⁰⁰

Formulating a definition and laws governing marriage had to wait until the Council of Trent (1545 - 1563). The Roman Church declared marriage to be a sacrament and its validity could only be established if it was performed by a priest before two witnesses – thus confirming marriage as a public act. Marriages were to remain monogamous, and were indissoluble. The Catechism, issued following the Council of Trent in 1566, defined marriage as “The conjugal union of man and woman, contracted between two qualified persons, which obliges them to live together throughout life.”

The final formulation of the definition of marriage had to wait until Lord Penzance made his famous declaration in 1866.

In insisting that marriage was a religious sacrament governed by canonical laws and Catholic teaching, the church perhaps unwittingly laid the foundations for the separate development of marriage as a secular civil institution.

...the union of a man and a woman...?

Same-sex marriage in history

Many of the submissions to both this inquiry and the 2009 inquiry insist that marriage has always only been the union of a man and a woman. Their authors either ignore, or are unaware of historical instances of same-sex marriage, for example, in Ancient Rome.¹⁰¹ Historian John Boswell has similarly identified instances of same-sex marriage.

Cicero (Philippic 2.18.45) refers to a debt incurred by Antonius to whom Curio the Younger was, he says: “united in a stable permanent marriage”. Juvenal (Satire 2:132-35) when asked where he was going, replies “To a ceremony. Nothing special: a friend is marrying another man and a small group is attending.” Lucian reports on the “marriage” of two women one of who refers to her female partner as “her wife...for a long time.” The Emperor Elagabalus was not only “married” to another man (Hierocles) who his contemporary biographers (Dio and Lampridius) refer to as “his husband” but the Emperor’s affairs with other men are described as “adultery”.¹⁰²

¹⁰⁰ Wolfson: op cit p.7

¹⁰¹ Chris Scarre: *Chronicles of the Roman Emperors*, (London: Thames and Hudson Ltd, 1995) especially at p 151 ff

¹⁰² John Boswell: *Same-Sex Unions in Pre-Modern Europe* (Villard Books, New York, 1994) p. 84

Such “marriages” were sufficiently prevalent that in 342 AD Christian emperors Constantius II and Constans issued a law in the Theodosian Code (*C. Th.* 9.7.3) prohibiting same-sex marriage in Rome and ordering execution for those so married.¹⁰³

Boswell’s extensive and authoritative work appears not to have informed the Senate Committee in relation to an understanding of the historic origins of same-sex marriage, nor indeed we assume was the Committee aware of the evidence of a same-sex marriage between the two men Pedro Díaz and Muño Vandilaz in the Galacian municipality of Rairiz de Veiga in Spain on April 16, 1061. They were married by a priest at a small chapel. The historic documents about the church wedding were found at the Monastery of San Salvador de Celanova.¹⁰⁴

Equally ignored is the evidence of same sex marriage in non-Christian countries such as China.¹⁰⁵ We make this point merely to point out that the Senate Committee’s positive reference to and reliance upon “the origins of the word marriage” at para 4.45 is clearly not based upon a fully informed history of this whole question and we are not sure that any evidence on this matter was before the Committee in any event.

The union of a man and a woman – equal partners?

The phrase “the union of a man and a woman” can suggest the man and woman are equal partners. Yet it has taken a long time for issues of equality between the partners to be resolved. Evan Wolfson writes:

“Ending the exclusion of gay people from marriage would not change the ‘definition’ of marriage, but it would remove a discriminatory barrier from the path of people who have made a commitment to each other and are now ready and willing to take on the personal and legal commitments of marriage. This is not the first time our country (i.e. the USA) has struggled over exclusion from and discrimination in marriage. Previous chapters in American history have seen race discrimination in marriage (ended only in 1967), laws making wives legally inferior to husbands (changed as late as the 1970s and 1980s), resistance to allowing people to end failed or abusive marriages through divorce (fought over in the 1940s and 1950s) and even a refusal to allow married and unmarried people to make their own decisions about whether to use contraceptives or fraise children (decided in 1965).”¹⁰⁶

To this one could add matters related to such sensitive issues as the rights of both parties to make decisions about terminations of pregnancy or “rape” in marriage. In

¹⁰³ Kuefler, Mathew: “The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law”, *Journal of Family History* 32 (4): 343–370

¹⁰⁴ Boswell: op cit at p. 257, quoting *Document of 1031 from the Cartulary of Celanova*. Further relevant material may also be found in Mark D Jordan (ed): *Authorising Marriage – Canon, Tradition and Critique in the Blessing of Same Sex Unions* (Princeton University Press, Princeton NJ, 2006).

¹⁰⁵ Hirsch, Bret : *Passions of the Cut Sleeve: The Male Homosexual Tradition in China*. (Reed Business Information, Inc. 1990).

¹⁰⁶ Wolfson op cit at page 190

other words, even within the “traditional” definition of marriage the state has asserted a right to define and regulate – in ways which have primarily reflected changing social norms and values rather than significant changes in fundamental principles. In many cases this “interference” by the state has been resisted by precisely the same interests who are now opposing gay marriage.

In this respect we draw attention to the Submission of His Eminence George Cardinal Pell where he asserts that:

*“Marriage is pre-political and the state has in this sense inherited marriage. The state should not alter and supply different reasons for an institution which it has inherited”*¹⁰⁷

With due respect to His Eminence, that is precisely what the state has been doing since it “inherited” the institution of marriage - removing many of its original features which included polygamy (how many wives did King Solomon really have?); child brides; enforced marriages; the right of a husband to force his wife to have sexual relations with him and many other equally undesirable characteristics as well.

... to the exclusion of all others ...?

While the Catholic Church may have insisted marriage was indissoluble, it was not a position that could be realistically maintained.

As Henry Finlay has noted:

*“The indissolubility of marriage before 1857, then, was an article of faith to which the English establishment paid lip service and which nurtured the pretence that marriages were more likely to succeed if the parties knew that there was no way they could get out of their marriage. Undoubtedly however, it was a fact of life that there would always be people, especially men, who came to lose interest in their partner and want to change to another one. To meet this simple fact of human nature, a great industry had developed in the church courts before the Reformation, which made fullest use of the concept of the nullity of marriage. If a marriage was null and void, then no marriage had ever come into existence, and it remained but for the fact to be recognised to have the presumed ‘marriage’ set aside by an order of an ecclesiastical court.”*¹⁰⁸

¹⁰⁷ Submission number 113

¹⁰⁸ Finlay op cit p 5 Finlay suggests the ecclesiastical courts developed the device of annulment into a “sophisticated system” which has been described as a ‘calculus of kinship’.” This “calculus of kinship” essentially involved persons seeking annulment by resorting to the prohibitions of marriage relating based on consanguinity and affinity. Among these was a prohibition preventing a widower marrying his deceased wife’s sister, made part of English marriage law by Lord Lyndhurst’s Act in 1835, and which in turn prompted a seven decade debate over whether marriage to a deceased wife’s sister should be legalised. (See Frew, *Charlotte Marriage to a Deceased Wife’s Sister and the Origins of Lord Lyndhurst’s Act*, http://www.arts.mq.edu.au/documents/2_Charlotte_Frew.pdf. W.S Gilbert commented on this debate when he had the Fairy Queen declare that when Strephon entered parliament he would, *inter alia*, “...prick that annual blister, marriage to deceased wife’s sister.”

Finlay notes that in England, with the Reformation, "... the old expedient of annulment of marriage, available within the Roman Catholic Church on an almost fictitious basis, had almost disappeared ..."¹⁰⁹

It was replaced with divorce by Act of Parliament, which Finlay says enabled male aristocrats and other men of wealth to be rid of an unfaithful wife and ensure an untainted succession with a new wife. A man could apply to Parliament for a divorce on the basis of a single act of adultery by his wife; a wife could only get a divorce on the ground of aggravated and repeated adultery by her husband.

The first recorded divorce by Parliament occurred in 1669. Over the next 160 to 170 years something over 300 parliamentary divorces were granted, only four to women.¹¹⁰ This of course reflected the social norm of the time (in certain classes of society) that a man was "entitled" to indulge in rakish behaviour but his wife had to be akin to Caesar's.

... voluntarily entered into ...?

"Voluntarily entered into" suggests a marriage in which the husband and wife freely choose each other, and made the decision to marry free of coercion or other external considerations – in other words, marriage for love. Yet the history of marriage shows otherwise.

Noting that for thousands of years, marriage was about property, Stephanie Coontz has observed:

"For centuries, marriage did much of the work that markets and governments do today. It organised the production and distribution of goods and people. It set up political, economic and military alliances. It coordinated the division of labor by gender and age. It orchestrated people's personal rights and obligations in everything from sexual relations to the inheritance of property. Most societies had very specific rules about how people should arrange their marriages to accomplish these tasks.

*Of course there was always more to marriage than its institutional functions. At the end of the day – or at least the middle of the night – marriage is also a face-to-face relationship between individuals. The actual experience for individuals or for particular couples seldom conforms exactly to the model of marriage codified in law, custom, and philosophy in any given period."*¹¹¹

... for life ...?

Finlay has noted that by the nineteenth century, there was a growing recognition that divorce by Act of Parliament was only an option for the very wealthy. The demand for divorce grew, due to the industrial revolution creating a new class of wealthy

¹⁰⁹ Finlay, op cit p4

¹¹⁰ Finlay op cit p6

¹¹¹ Coontz, Stephanie *Marriage, a history: How love conquered marriage*, 2005, Kindle e-book.

industrialists, who wanted to guard their wealth “not least from the progeny of a faithless wife”.¹¹²

Danaya C. Wright, Associate Professor of Law at the University of Florida has referred to the perception in the 1850s of:

“... a social and moral crisis: the so called divorce epidemic among the wealthy and the exclusion from divorce by a rapidly growing, vocal middle class.”¹¹³

The result was the enactment of the *Divorce and Matrimonial Causes Act* in 1857. The Act essentially transferred the granting of divorces from Parliament to a new Court for Divorce and Matrimonial Causes, while retaining the double standard in the grounds on which husband and wife could obtain a divorce.

“... the final shift in the secularization of divorce and a recognition that matrimonial affairs belonged firmly under judicial oversight ... a rejection of ecclesiastical and legislative control over the marital relationship as well as a unification of family property, custody, and marital status determinations.”¹¹⁴

Strangely, these developments also provided the environment in which Lord Penzance declared, in 1866 that:

“*Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others*”¹¹⁵

Yet, as the Hon Alastair Nicholson AO RFD QC has noted that this definition was inaccurate at the time and remains inaccurate today.

“*It is difficult to understand how even in 1866, marriage could have been defined as a union for life, having regard to the passage of the Divorce and Matrimonial Causes Act in England in 1857.*”

Indeed, Lord Penzance would, or should have known this. He was, after all, presiding at the recently established Court for Divorce and Matrimonial Causes and had done so since 1853.

The case itself involved a *petition* for divorce from Hyde, a young Englishman who had joined the Mormon faith in 1847 at the age of 16. In April, 1853, his marriage to a Miss Hawkins was celebrated in Salt Lake City by Brigham Young according to the rites of the Mormon Church. He subsequently renounced his faith, was excommunicated and his wife declared free to marry. She subsequently married

¹¹² Probert, Rebecca Hyde v Hyde: defining or defending marriage?, *Child and Family Law Quarterly*, Vol. 19, No. 3, pp. 322-336, 2007

¹¹³ Wright, Danaya C. "Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866" *University of Richmond Law Review*, Vol. 38, No. 4, 2004, p available at <http://www.law.ufl.edu/faculty/pdf/wri1.pdf>

¹¹⁴ Finlay *op cit.* p7

¹¹⁵ [L.R.] 1 P. & D. 130 available at <http://www.uniset.ca/other/th/LR1PD130.html>

Woodmansee, in 1859 or 1860, again according to Mormon rites. Hyde's petition sought a divorce on the grounds that his wife had committed adultery.

Lord Penzance dismissed the petition, on the basis that as Mormon marriage allowed for polygamy, it could not be considered marriage in England:

*“What, then, is the nature of this institution as understood in Christendom?...If it be of common acceptance and existence, it must needs have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”*¹¹⁶

The recognition of the fact that marriages often (indeed increasingly) do not last forever / for life and may be dissolved was imported directly into the Australian Constitution when the Founders drafted sections 51 (xxi) and (xxii) which refer to “marriage” and “divorce and matrimonial causes....”

Historical records of the Constitutional Conventions reveal that this Commonwealth power was copied from section 91(26) of the Canadian Constitution Act 1867 (assigning the national government power over “marriage and divorce”). Canada of course has found same sex marriages to be consistent with their Constitution.

That lifelong union may be (and we agree) a worthy and desirable aspiration – the question however is whether that should be the definition in statute law.

Nevertheless as far back as 1689 the English historian John Selden was moved to declare that:

*“Marriage is nothing but a civil contract.”*¹¹⁷

Similarly in 1765 Sir William Blackstone wrote that:

*“Our law considers marriage in no other light than as a civil contract. The Holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience.”*¹¹⁸

If this be the case, the right of parties to enter into a contract cannot surely be dependent upon the sexuality or gender of those contracting parties.

Indeed Blackstone indicates that the only impediments to marriage which may be properly recognised are (a) an existing marriage still in place, (b) age, (c) an absence of consent and (d) “a want of reason.”¹¹⁹

¹¹⁶ *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133

¹¹⁷ *Table-talk, Being Discourses of John Selden, Esq Or His Sense of Various Matters of Weight and High Consequence, Relating Especially to Religion and State.* (1696) at page 82

¹¹⁸ *Commentaries on the Laws of England*, Book 1, chapter 15

¹¹⁹ *idem*

To ignore the history of marriage as an institution having as much to do with property rights and inheritance is to ignore the facts of history.

Again, we acknowledge the significance of the Judeo-Christian values inherent in Australian society but express their concern that a definition, cast within the “understand(ing) in Christendom” is still a relevant basis for Australian public law, especially in light of the fact that one of the few express guarantees of human rights in the Australian Constitution is that the Parliament may not make laws privileging religion, religious observation or religious test or qualifications (section 116).

Not so much a definition as a defence

It is clearly ironic that a Judge should pronounce that marriage is for life, which presiding over a court established for express purpose of bringing marriages for an end. Yet this is only part of the irony.

In her paper, Rebecca Probert argues that Lord Penzance was not so much defining marriage, as defending it. The explicit reference to Christendom was designed to protect Christianity from polygamous marriages and the religions which might allow them. She observes:

*“As a definition of marriage, then, Lord Penzance’s description of marriage is seriously flawed, since it is capable of encompassing a large number of persons who are not married while at the same time excluding a significant number of married couples.”*¹²⁰

Indeed. There are many couples who have never formally or legally married but are committed to each, and live a monogamous life together, thus fitting Lord Penzance’s definition. This social fact resulted in the development of the concept of common law or de facto marriage, and in Australia at least an extensive body of de facto relationships law.

Nor could Lord Penzance’s definition realistically apply as an absolute for all actual marriages. Taking it to its logical conclusion, if all married couples were required to conform to this definition throughout the duration of their marriage, they would arguably cease to be married.

For example, Probert cites a survey published in the London Times in which 34% admitted having at least one affair in their first marriage. That is, they failed to “exclude all others”.

What then of the so-called “shotgun weddings” – marriages where a young woman fell pregnant, and her father insisted that the man responsible marry his daughter. In most cases an actual shotgun may not have been used, but strong social pressure and induced feelings of guilt would have achieved the same result. Given the social and moral coercion involved, can such marriages be said to be “voluntarily entered into”.

¹²⁰ Probert, op cit p323

The procreation argument

Many of the submissions to the 2009 inquiry, and no doubt to this inquiry) argue that “natural procreation” is the primary purpose of marriage. Not surprisingly, this accords with the official position of the Catholic Church. This shows deliberate disregard of matters such as

- § marriage of people clearly unable (by reasons of age, disability etc.) to have children
- § marriage by heterosexual couples who deliberately chose not to have children
- § “procreation” by means presumably not “natural” i.e. IVF, artificial insemination
- § children coming into a marriage by adoption,

and takes a view of marriage which is entirely based upon a religious and not a secular evaluation of its worth and simply flies in the face of both modern science and contemporary reality.

The choice of the pejorative term “natural” of course implies that there is a subclass of “unnatural” procreation – presumably this is what some heterosexual couples (using IVF) and all same sex couples do.

In his current submission to the Inquiry, George Cardinal Pell devotes the majority of his argument against same-sex marriage to asserting the proposition that the only valid form of marriage is one that is, in his words, “inherently procreative”. He encompasses those marriages between heterosexual couples where no procreation is actually possible on the basis that:

“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.”¹²¹

In our view this **reduces** marriage to a purely sexual and physical set of arrangements and defines it in terms of a sexual/physical activity to the exclusion of all other reasons, justifications or values- either personal or social.

We reject this view of marriage defined by sex.

Similarly, His Eminence’s submission asserts (based on the Universal Declaration of Human Rights, 1948) that “The right to marry is a fundamental human right.”¹²²

He then goes onto argue, in effect, that somehow the term “human” does not apply to homosexuals. Again, this is a position we would call upon the Senate to reject.

¹²¹ Submission number 131

¹²² idem

Concerns about same sex parenting

One of the most often repeated points of opposition to the recognition of same-sex marriage relates to claims about the “rights” or welfare of children.

This matter was canvassed at some length in the Report of the Senate Legal and Constitutional Affairs Legislation Committee in 2009.¹²³

Sections 4.15 to 4.25 emphasise the “right” of children to be brought up by either what the submitters quoted refer to as “their biological parents” or “a mother and a father”. Such a position was even more strongly emphasised in the *Dissenting Report* by Senator Barnett.¹²⁴

This view is perhaps best encapsulated in the terms of the submission of the Australian Christian Lobby which further emphasised that, in its view:

*“reducing marriage to a simple contract of consent and love between two people is a revisionist approach that has neither context nor legitimacy. It is a selfish, adult-centred approach that rejects the broader cultural significance of marriage and its centrality to society.”*¹²⁵

This approach to marriage, namely that its essential purpose and almost sole legitimacy, is because of its procreative potential was further developed by Margaret Somerville (a Canadian ethicist at McGill University, Montreal, Canada) when she wrote:

*“Recognising that a fundamental purpose of marriage is to engender respect for the transmission of human life provides a corollary insight: excluding same-sex couples from marriage is not related to those people’s homosexual orientation, or to them as individuals, or to the worth of their relationship. Rather the exclusion of their relationship is related to the fact that it is not inherently procreative. Same-sex marriage is symptomatic of adult-centred reproductive decision making. But this decision should be child-centred. This means we should work from a basic presumption that children have an absolute right to be conceived from natural biological origins, that is, an untampered-with ovum from one, identified, living, adult woman and an untampered-with sperm from one, identified, living adult man.”*¹²⁶

Professor Somerville has repeated most of these arguments in her Submission to this Inquiry, however she is more explicit in spelling out her concerns.¹²⁷

She asserts that:

¹²³ Australian Senate; *Senate Legislation Committees, Report on the Consideration of Bills July-December 2009, vol 4 (February 2010)*. Legal and Constitutional Affairs committee – *Marriage Equality Amendment Bill 2009* (November 2009)

¹²⁴ *Ibid* para 1.7 p. 224

¹²⁵ *idem*

¹²⁶ Somerville, Margaret: “It’s all about the children, not selfish adults”, *The Weekend Australian* 23/24 July 2011

¹²⁷ *Submission* number 65

- § the debate about same-sex marriage involves a direct conflict between the “rights of children” and those of “homosexual adults.” We reject this assertion - there is no inevitable conflict between the two, both can equally co-exist;
- § she recognises that many objections to same-sex marriage are based “on religious grounds or because of moral objections to homosexuality” and in this respect we agree with her. We just assert that neither is a sufficient basis upon which to ground public policy;
- § what she calls “reprogenic technoscience” constitute, by definition, an assault on “children’s human rights” because “children have an absolute right to be conceived from natural biological origins”. This is a further point with which we disagree. The issue is not the technology per se (starting with the conception of Louise Brown, the first IVF baby born in 1978), but the uses to which it is put and the controls imposed upon it by the law. It also seems to ignore the fact that even when children are so conceived, they may not necessarily be the beneficiaries of being raised in a supportive family environment. In 2010, 34% of all births in Australia were ex-nuptial births, ie births to parents who were not married at time – this percentage has been increasing over time.
- § finally we would caution the Senate Committee to read warily her recitation of legal consequences of similar Canadian legislation in light of the fact that most such cases were brought under the provisions of the Canadian Charter of Rights, of which there is no Australian equivalent.

We invite the Senate Committee to consider these propositions in the light of the fact that they devalue:

- § Post-menopausal marriages
- § Marriages where one party, by reason of (known) infertility or disability is unable to procreate
- § Marriages where both parties chose – for whatever reasons – to remain childless.

Indeed, as Wolfson points out:

“No state requires that non-gay couples prove that they can procreate – or promise that they will procreate – before issuing them a marriage license. Indeed, no state requires as a condition of a valid marriage that a couple promises to even engage in sexual intercourse, which would be required for traditional procreation.”¹²⁸

However since such proponents of this exclusively procreative-focussed definition of marriage are too timid to actually denounce such marriages – knowing that the overwhelming majority of decent people would excoriate them for so doing, they focus upon same-sex couples as the only group of people to be excluded from the right to marry on the basis of their non-procreative potential.

¹²⁸ Wolfson : *op cit* p. 80

Of course even this is no longer true – if indeed it ever was. Advances in all areas of reproductive technology (and leaving aside the question of adoption – which is available to same-sex couples under several Australian state and territory laws¹²⁹) mean that same sex-couples are able to “procreate” successfully.

Thus the “procreative” argument is nonsensical in terms of biological reality. It is, as this Submission has already shown, also denied by the history of the marriage institution itself which, in its earliest days and in many societies was hardly concerned at all with the rights of children.

Your Submitters do not deny that the rights of children are important, or that every child has the inherent right (as a human being) to be brought up in a loving, supportive and nurturing environment.

As such, we note two comments by the 2009 Committee:

“The committee recognises that there may be insufficient data collected within the Australian context to draw definitive conclusions about any impact that same-sex parenting may or may not have on children.”¹³⁰

.....

“While the committee received evidence from submitters citing a range of research, no clear and definitive research was presented which unequivocally supported the assertion that children raised by same-sex parents suffered any unique or particular adverse developmental disadvantage.”¹³¹

The Committee however then drew a rather tendentious conclusion that:

“...the committee received compelling evidence relating to the importance of involving both male and female role models in a child’s development.”¹³²

What the 2009 Committee failed to appreciate is that (apart from not stating what the “compelling evidence” was) “male and female role models” are not the same as a biological father and a biological mother married to each other. This failure to understand that in same-sex couple family arrangements there may well be both male and female role models, although they may not be the biological parents of the child in question (although in many cases they will be) and they may not be living under the same roof. The Committee is equally in error in supposing that male and female role models have to live together: the whole concept of “shared parenting” among divorced (or never married) couples seems to have escaped the notice of the 2009 Committee entirely.

However since that date this very question has been the subject of a detailed parliamentary enquiry and we refer to Committee to the *Inquiry into Same-sex Parenting* by the Social Development Committee of the Parliament of South Australia which reported in May 2011.

¹²⁹ Adoption by same-sex couples is permitted in Western Australia, New South Wales, the ACT and in limited circumstances in Tasmania.

¹³⁰ Senate Committee: op cit at 2.32

¹³¹ Ibid at 4.22

¹³² idem

We believe that this is the first such parliamentary, public inquiry into this issue and that as such, the findings and conclusions of that Committee should be taken seriously.

The Committee states, unequivocally (and without dissent):

“.....the Committee does not accept that affording same-sex couples the same legal rights as heterosexual couples will lead to the social disintegration of the family unit. The Committee considers that attaching a narrow boundary to the definition of ‘family’ serves only to exclude a significant proportion of the South Australian community. The Committee recognises that family units are not fixed entities; they have changed over the years and take on different forms in different social and cultural settings. Many children are born into, or live in, single parent families, blended families or multi-generational families.

The Committee heard no compelling evidence that children are disadvantaged by being raised by same-sex parents or that same-sex parents are unfit to look after children. On the contrary, evidence presented by same-sex parents suggest they aspire and strive for their children to be well-adjusted, healthy and productive members of the broader community. The Committee has formed the view that how well children develop is largely influenced by the level of cohesion within a family and the support and care children receive rather than the particular formation that a family unit takes.”¹³³

This evidence supports recent findings of a world-wide study of same-sex parenting and children which was available in 2006 but not referenced by the previous Committee.¹³⁴

As far back as 2002 a definitive study of lesbian and gay families by family law specialist and barrister Jenni Millbank concluded along exactly the same lines. Indeed in one respect the Millbank research went further, noting, for example that:

“several studies have found that lesbian mothers were in fact more concerned than heterosexual women that their children should have contact with men and positive role models, and that the children of lesbian mothers did indeed have more contact with adult male family members and friends than did children of heterosexual parents.”¹³⁵

There is also clear data to demonstrate that the number of children being conceived/raised with same-sex families is increasing. No adverse social consequences of this have been demonstrated.

¹³³ Parliament of South Australia: 32nd Report of the Social development Committee: *Inquiry into Same-sex Parenting* (17 May 2011) p. 3-4. See also the remarks in the Legislative Assembly by Hon RB Such MLA about the success of war-widows in raising their children without male role models (18 May 2011)

¹³⁴ Eskridge, WN and Spedale, DR: *Gay Marriage – for better or worse? What we’ve learned from the evidence* (Oxford University Press, Oxford, 2006)

¹³⁵ Millbank, Jenni: *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, January 2002, p.7/8

Similarly in 2007, the Australian Psychological Society concluded after a major literature review, and with the full imprimatur of its professional judgement that:

*“...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.”*¹³⁶

This Australian study replicates the review and conclusions of the American Psychological Association (APA) which reported in 1995 that children raised by gay parents are not “disadvantaged in any significant respect relative to the children of heterosexual parents.”¹³⁷

The United States Human Rights Campaign Foundation notes that this APA position is supported by the American Academy of Family Physicians, the American Psychiatric Association, the American Psychoanalytic Association, the Child Welfare League of America, the North American Council on Adoptable Children, the National Educational Association and the National Association of Social Workers, among others.¹³⁸

It is also consistent with the findings of the Australian Raising Children Network, a body sponsored originally by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs.¹³⁹

There is also a study reported from Spain, undertaken by researchers at the University of Seville, which reaches the same conclusions especially noting that children in such families exhibit “favourable ideas towards the social integration of diversity regarding culture, family and sexual orientation.”¹⁴⁰

In the United Kingdom when the House of Commons considered the Human Fertilisation and Embryology Bill it was asked to consider an amendment to the legislation which would have required fertility clinics to consider a child’s “need for a father” before providing access to treatment. The Commons rejected this amendment in favour of a requirement for “supportive parenting” making it clear that traditional gender stereotypical limitations were inappropriate.¹⁴¹

A pertinent observation is made by Michael S Wald at the conclusion of his study of same-sex parenting. After demonstrating that none of the major United States studies on this issue had found that children of same-sex couples “experienced emotional, intellectual or social development problems because of their parents’ sexual

¹³⁶ Australian Psychological Society: *Lesbian, Gay, Bisexual and Transgender Parented Families* (August 2007)

¹³⁷ Quoted in Wald, Michael: *Same-sex couples: Marriage, Family and Children* (buddybuddy.com, December 1999).

¹³⁸ Wolfson: *op cit* p. 93

¹³⁹ Raising Children Network: *Parenting in same-sex relationships* (15 May 2006)

¹⁴⁰ “Children growing up in gay families are no different”, *SUR in English*, 12-18 July 2002

¹⁴¹ Totaro, Paola: “Gays win in landmark parenting decision”, *Sydney Morning Herald*, 22 May 2008

orientation”]; that none suffered any increased problems at school, or with self-destructive behaviour, with employment or with transition to adulthood, he nevertheless went on to say:

*“These children’s lives were not problem free.... (but, in essence the children) had learned to deal with the fact that society considered their family different, just as children living in other minority families, for example religious minorities or inter-racial families, learn to cope with community stigma based on their family’s difference.”*¹⁴²

This matter has been central to arguments before the American courts in relation to the balances needing to be struck in public policy debates about same-sex marriage.

The first of these was in Vermont where the State Supreme Court held:

*“It is Undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, that others are incapable of having children. Therefore if the purpose of the statutory exclusion of same-sex couples is to ‘further the link between procreation and child rearing’ it is significantly under-inclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to (that stated) goal..... To the extent the State’s purpose in licensing civil marriage was, and is, to legitimise children and provide for their security, the statutes (under challenge) plainly exclude many same-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws and designed to secure against.”*¹⁴³

In Massachusetts, the Court said:

*“Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family ... Even people who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”*¹⁴⁴

Exactly the same point, namely that the procreation of children is one of, but only one of many reasons for people getting married and in many cases not a reason at all, was approved by the United States Supreme Court in *Turner v Safley* as early as 1987.

In that respect, we would suggest that if the Committee wishes to do something to improve the welfare of children, then removal of the discrimination which leads to

¹⁴² Wald, quoted in Wolfson : *op cit* p. 92

¹⁴³ Supreme Court of Vermont, *Baker v Vermont*, 774 A.2d 864

¹⁴⁴ *Goodridge v Department of Public Health*, Massachusetts Supreme Judicial Court, 2003.

those very children being abused, taunted, discriminated against¹⁴⁵ and humiliated when their parents are denied the right to get married would be a far more positive response than maintaining that very discrimination.

¹⁴⁵ Just one example may suffice: the refusal of a Catholic primary school in Broken Hill (NSW) to enrol a child because she was the daughter of a (female) same-sex couple. ABC News *transcript*, 13 December 2011

CHAPTER 7 :

ALTERNATIVES TO SAME SEX MARRIAGE

The opponents of same sex marriage fall into two broad groups: the first is motivated by strong objections to homosexuality and homosexuals which may be motivated by deeply held religious or moral views and beliefs, strong prejudice, ignorance or a combination of all of these. People in this group are unlikely to support any reform which, in their eyes, “legitimises homosexuality”. Some may deny having any prejudice against homosexuals, claiming that they “love the sinner, hate the sin”, but their objections to “the sin” put them firmly in this group.

The second group will have more tolerant, liberal views about homosexuality. They know that homosexuals are capable of forming committed, loving relationships and recognise these relationships should have some legal recognition, and that people in these relationships should have the same rights, entitlements and responsibilities as people in heterosexual relationships.

Despite this, providing this recognition through same sex marriage is “a bridge too far”. Their reluctance or refusal to support same sex marriage may also be based on deeply held religious or moral views, a reluctance or refusal to accept that the love and commitment homosexual partners have for each other can equal the love and commitment of a married couple, discomfort about homosexuals making public commitments about love, fidelity and permanence, adherence to the view that marriage can only ever involve a man or a woman, or is primary about the creation of families, or simple pragmatism and timidity. This last group fears being out of step with community attitudes, or what they assume to be community attitudes.

Some try to justify their position by resorting to the “separate but equal argument”. Rather than supporting same sex marriage, they propose a range of alternative measures: recognising homosexual relationships as de facto relationships, or introducing more formal means of recognition such as registration schemes, civil partnerships and civil unions.

While such schemes may provide some benefits and protection to same sex couples, they are not equal to marriage in that they do not provide the same level of security, certainty, public acknowledgement, status and universality.

The American conservative philosopher Ronald Dworkin has explained why civil unions fail to provide equality:

“The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of

commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed. We know that people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.

Civil union status may provide many of the legal and material benefits of marriage, but it does not provide the social and personal meaning of that institution because marriage has a spiritual dimension that civil union does not. For many people, this is a religious dimension, which some same-sex couples want as much as some heterosexuals do. For others it is the participation in the historical and cultural traditions that both kinds of couples covet. But whatever it is, if there are reasons for withholding the status from gay couples then these must also be reasons why civil union is not an equivalent opportunity.”¹⁴⁶

As we will show below, the various registration schemes introduced or being proposed in Australia simply provide some evidence that a de facto relationship exists. Such relationships will remain de facto relationships, with the social and moral status that various groups in society choose to impose on such relationships.

SEPARATE BUT EQUAL

Proponents of the “civil unions/domestic partner/registered relationships/etc. are in fact advocating a situation which may be characterised as “separate but equal.” Senators will recognise this term as infamously used by the United States Supreme Court in *Plessy v Ferguson* (1896) holding that States could constitutionally segregate the races in the provision of education services, provided that the facilities provided to each were “equal”.

Then Supreme Court’s decision contains many comments which may be translated into the current debate about marriage versus civil unions.

“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races (SEPARATE LEGAL ARRANGEMENTS FOR HETEROSEXUAL VERSUS SAME SEX RELATIONSHIPS) stamps the coloured race (SAME SEX COUPLES) with a badge of inferiority. If this be so it is not by reasons of anything found in the act (MARRIAGE ACT 1961), but solely because the coloured race (SAME SEX COUPLES) choses to put that construction upon it..... If the two races (HETEROSEXUALLY MARRIED COUPLES AND SAME SEX

¹⁴⁶ Dworkin, Ronald "Three Questions for America", *New York Review of Books* September 21, 2006

*COUPLES) are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals (IE EQUALITY IS NOT A MATTER FOR THE LAW ONLY FOR THE ACCEPTANCE BY THE MAJORITY OF THE RIGHTS OF THE MINORITY)..... If one race (SAME SEX COUPLES) be inferior to the other socially, the constitution of the United States (THE COMMONWEALTH MARRIAGE ACT) cannot put them upon the same plane.”*¹⁴⁷

Note the repeated arguments that the right of minorities are not independently inherent in the human nature and dignity of the human beings concerned but are dependent upon the acquiescence in recognition of that humanity by the majority. This is exactly the position some opponents of gay marriage take today. They advocate a position in which the rights of one person (a member of a same-sex couple) are put to one side in favour of a person not yet born (i.e. a potential child) whose “rights”/development is claim would be infringed by the granting of equal rights to another person. This is a specious argument with no basis in fact or logic.

Extending human rights is like lighting another person's candle from your own – yours does not burn any less bright for doing so and there is twice as much light in the world.

“Separate but equal” remained the settled law of the United States – with all its terrible consequences, until it was overturned by the same Supreme Court in *Brown v Board of Education* (1954) which ruled that “the doctrine of ‘separate but equal’ has no place. Separate (educational facilities) are inherently unequal.”

Part of the Court's reasoning may again be applied to the current issue.

*“Segregation of white and coloured children (LEGAL DISTINCTIONS BETWEEN HETEROSEXUALLY MARRIED AND SAME SEX COUPLES) has a detrimental effect upon the coloured children (SAME SEX COUPLES). The impact is greater when it has the sanction of law, for the policy of separating the races (PRIVILEGING HETEROSEXUAL MARRIAGE) is usually interpreted as denoting the inferiority of the negro group (SAME SEX COUPLES). A sense of inferiority (CLEARLY FELT BY MANY SAME SEX COUPLES) affects the motivation of a child to learn. Segregation (THE LEGAL DISTINCTION BETWEEN HETEROSEXUALLY MARRIED AND SAME SEX COUPLES) with the sanction of law (THE MARRIAGE ACT) ... has a tendency ... to deprive negro children (SAME SEX COUPLES) of the benefits they would receive in a racially integrated (MARRIAGE EQUALITY)... system.”*¹⁴⁸

The argument that separate can be equal is not one that has any place as a matter of law where that law claims that all citizens have equal rights to equality before it.

That same point was made by the Court of Appeals for Ontario, Canada (June 2003) holding that “... the restriction against same-sex marriage is an offence to the dignity of lesbians and gays, because it limits the range of relationship options to them.”¹⁴⁹

¹⁴⁷ US Supreme Court, *Plessy v Ferguson* 163 US 537(1896) in Headnote

¹⁴⁸ US Supreme Court *Brown v Board of Education* 347 US 483 (1954)

¹⁴⁹ *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003)

In the submission of the Catholic Diocese of Sydney quoted at para 4.26 of the Senate Legal and Constitutional Committee report¹⁵⁰ (Marriage Equality Amendment Bill 2009) attention was drawn to “the educative and symbolic role of the law”. If that be true, then the educative role of the current law is to say that same sex marriages are lesser than heterosexual marriages and that symbolically one is to be privileged over the other. The question is whether the Australian Senate still accepts that function and consequence of the current Marriage Act.

Similarly at 4.30 of that Report the Committee noted evidence that “not all discrimination is bad”. The question is whether the Australian Senate still accepts that discrimination against same sex couples is “not bad.”

Again at 4.34 the Committee noted a submission arguing against a change in the law on the basis that same sex couples have “legal rights almost identical to” those of other couples. The question is whether the Australian Senate accepts that rights “almost” identical are sufficient and acceptable.

Put another way by columnist Deb Price:

*“Those heterosexual still uneasy with same-sex marriage often ask, “Why marriage? Why can’t you have all the rights and benefits and just call it something else?” Our answer is simple: Because then it would be something else.”*¹⁵¹

Your submitters have previously illustrated the parallels between the current discrimination against same sex couples with those previously suffered by black Americans. Another interesting parallel suggests itself arising from the decision of the US Supreme Court in *Turner v Safley* (1978) which upheld the right of *prisoners* to get married, striking down a Missouri law which allowed Warden’s to prevent this. The Court said:

*“The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration (SAME SEX STATUS). Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life (SAME SEX STATUS). First, inmate marriages, (SAME SEX MARRIAGES) like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship.”*¹⁵²

As far back as the Report of the Royal Commission on Human Relationships (1977) this issue was in play. The Commission itself (of which Anglican Archbishop Felix Arnott was a member) quoted, with approval the submission from CAMP Inc (the first organised gay and lesbian activist group) to the effect that:

¹⁵⁰ Senate Legal and Constitutional Committee : *Marriage Equality Amendment Bill 2009*

¹⁵¹ Detroit News, 22 December 2003

¹⁵² US Supreme Court *Turner et al v Safley et al* 482 US 78 (1987)

*“What is really destructive to homosexual themselves is not society’s view of them so much, as when they see these roles as **the only roles** they can adopt and so in fact put themselves into them because it is better to be accepted as **something than nothing** at all.”*¹⁵³ (emphasis added)

Your Submitters would like to give the final word on the importance of recognition and the impact of words, to His Grace Rowan Williams, the Archbishop of Canterbury and Head of the Anglican Church. In an important address to the World Council of Churches Ecumenical Centre in Geneva on 28 February 2012 he said:

*“Where it has been commonplace to use stereotypic words and images of others, we come to see that by using such words and pictures we are in effect treating some person or group as people we need not fully **recognize** as fellow-human beings and fellow-citizens, people who do not belong in the same way we do. And once that is acknowledged, the law properly steps in to do what it is there to do – secure recognition”*¹⁵⁴ (emphasis in original)

That is what the Senate is being called upon to do – use the legitimate power of the state to “secure recognition” for people who are otherwise not being treated as equal “fellow-citizens.”

THE DIFFERENCES BETWEEN RELATIONSHIP RECOGNITION MODELS – AND WHY MOST DON’T MEASURE UP

Marriage

The commitment married couples make to each other is explicit and public. Indeed, section 46 of the Marriage Act 1962 requires it to be spelled out:

(1) Subject to subsection (2), 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 authorised celebrant shall say to the parties, in the presence of the witnesses, the words:

*"I am duly authorised by law to solemnise marriages according to law.
"Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.*

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.";

or words to that effect.

¹⁵³ Royal Commission on Human Relationships: *Final report, volume 5*, (AGPS, Canberra, 1977) page 113

¹⁵⁴ Williams, Rowan *“Human Rights and Religious Faith”*. Transcript from ABC Religion and Ethics Report, 29 February 2012.

(2) Where, in the case of a person authorised under subsection 39(2) to solemnise marriages, the Minister is satisfied that the form of ceremony to be used by that person sufficiently states the nature and obligations of marriage, the Minister may, either by the instrument by which that person is so authorised or by a subsequent instrument, exempt that person from compliance with subsection (1) of this section.

Many traditional wedding services go beyond this requirement by elaborating on “for life” – “for richer or poorer, in sickness or health, to death do us part.”

These legal requirements mean that when a couple marry, they are publicly making a commitment of fidelity and permanence. This is perhaps not only the strongest commitment that two people can make to each other, but a commitment which their family, friends and the community expect them to honour.

These explicit requirements and the nature of this commitment not only define marriage but set it apart from other forms of relationship.

Indeed, the alternatives for legal recognition lack clarity of definition, if they are defined at all.

De facto relationship

Many heterosexual couples choose not to marry. Homosexual couples do not have the option of marrying. Many may choose not to if this option was available.

While such relationships may be private personal relationships,, there will be circumstances when the law needs to be involved to ensure fairness, to prevent injustice or to provide protection. Often these are times of real crisis in people’s lives, for example when one partner is serious ill or injured, when one partner dies, or when the relationship breaks down.

The community may also require that such relationships are recognised: to ensure that people in such relationships are not treated more favourably than married people or that they do not avoid responsibilities expected of married people.

This has resulted in the development of a considerable body of law around de facto relationships, frequently against the opposition of people who regard any moves to recognise such relationships as undermining “the sanctity of marriage”.

Yet, ironically, protecting the sanctity of marriage motivated some of the earliest moves to recognise de facto relationships.

During the 1960s, the Commonwealth Government introduced two rates for the aged pension: a single rate and a lower married rate. Acting on the belief that two can live as cheaply as one, the government assumed that married couples would pool their pensions for their mutual benefit.

The decision, not surprisingly, provoked jokes and comments about couples living in sin were better off, and suggestions that elderly couples would be rushing to the

divorce courts to secure the higher pension. The government responded by deciding that people living in marriage like relationships would be paid the pension at the married rate.

Social security policy also demanded the recognition of de facto relationships to ensure that persons living in de facto relationships did not receive the Widows Pension or Supporting Parents Benefit.

To enforce this, the Government's social security agencies had to determine whether a man and a woman who occupied the same dwelling were "living as husband and wife". The simple fact of shared occupancy gave rise to the suspicion, and thus the possibility that a social security applicant or claimant was living in a de facto relationship.

In such cases, the agency would conduct its own inquiries into the nature of the relationship between the applicant/claimant and the other person to determine if it was marriage-like. Not surprisingly it led to complaints that social security officers were forced to become "bedroom police". A decision that a relationship was marriage-like would lead to the withdrawal of social security entitlements.

Claimants and applicants could challenge such decisions through a formal appeals process, and ultimately at an appeals tribunal. In such cases, the appellant argued h/she was not living in a de facto relationship but living independently, despite the shared occupancy. To assist make such determinations, the appeals tribunal developed a menu of factors that suggest the existence of a marriage like relationship. These criteria were subsequently developed and adopted by other areas of the law.

While the Commonwealth Government was facing the reality of de facto relationships to ensure people did not receive payments to which they were not entitled, the courts were increasingly dealing with the breakdown of such relationships, at least in New South Wales. Many of these were long term relationships, in which the couple had acquired property, usually a home. When the relationship ended, the weaker economic partner, usually the woman, sought to assert an interest in that property. In the absence of statutory remedies, the courts had to resort to the common law and equitable principles.

This, together with the recognition of other serious issues faced by people in de facto relationships led to reference to the NSW Law Reform Commission in July 1981. The Commission initially published an issues paper, which was followed by a comprehensive inquiry and a report, presented to the Government in 1983. The report's recommendations included a *De Facto Relationships Act* to provide for a statutory remedy for de facto partners seeking financial adjustments, changes to law relating to intestacy to recognise surviving de facto partners, along with other law reforms. In 1984 the NSW Parliament enacted a *De Facto Relationships Act* and amended the *Wills, Probate and Administration Act* along the lines suggested by the Royal Commission.

Section 3 of the *De Facto Relationships Act 1984* (NSW) defined de facto spouse as:

- (a) *in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him; and*

- (b) *in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.*

This was subsequently adjusted to define "de facto relationship" as:

"the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other."

Not surprisingly "de facto spouses" began asserting their entitlements to property through the courts, and equally unsurprisingly, some of these claims were resisted. In the case of relationship breakdown, respondents would deny that a de facto relationship had existed. In intestacy cases, surviving relatives of the deceased would challenge the existence of such a relationship. If their challenges were successful, they would be in the line of succession.

The Courts were thus faced with having to determine the existence of a de facto relationship. To do this, they resorted to the menu of factors developed by the Commonwealth's appeal tribunals in social security cases, as suggested by the Law Reform Commission Report.

Justice Powell, who was the trial judge for the first cases brought under the *De Facto Relationships Act*, observed that:

"... just as human personalities and needs may vary markedly, so also will the aspects of their relationship which lead one to hold that a man and woman are, or are not, "living together as husband and wife on a bona fide domestic basis" be likely to vary from case to case ... [each case would involve the Court] "... making a value judgment having regard to a variety of factors relating to the particular relationship".¹⁵⁵

These factors included but were not limited to:

1. *the duration of the relationship;*
2. *the nature and extent of the common residence;*
3. *whether or not a sexual relationship existed;*
4. *the degree of financial interdependence, and any arrangements for support, between or by the parties;*
5. *the ownership, use and acquisition of property;*
6. *the procreation of children;*
7. *the care and support of children;*
8. *the performance of household duties;*
9. *the degree of mutual commitment and mutual support; and*
10. *the reputation and 'public' aspects of the relationship."*

Other judgements entrenched the cohabitation rule, namely the requirement that a de facto couple live together under the same roof.

¹⁵⁵ *D v McV Eq 3882 of 1985* unreported.

In 1999, the NSW Parliament amended the *De Facto Relationships Act*, renaming it the Property Relationships Act and changing the definition of “de facto relationship” to:

“For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

- (a) who live together as a couple, and*
- (b) who are not married to one another or related by family.”*

This amendment brought same sex couples into the definition of “de facto relationship”. The amendments also included the list of factors which had been developed through case law to determine the existence or otherwise of a de facto relationship.

The responsibility for determining property disputes arising from the breakdown of de facto relationships now rests with the Family Court of Australia.

Section 4AA of the Family Law Act sets out the meaning of de facto relationship as follows:

- (1) A person is in a **de facto relationship** with another person if:*
 - (a) the persons are not legally married to each other; and*
 - (b) the persons are not related by family (see subsection (6)); and*
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis. Paragraph (c) has effect subject to subsection (5).*

Working out if persons have a relationship as a couple
- (2) Those circumstances may include any or all of the following:*
 - (a) the duration of the relationship;*
 - (b) the nature and extent of their common residence;*
 - (c) whether a sexual relationship exists;*
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;*
 - (e) the ownership, use and acquisition of their property;*
 - (f) the degree of mutual commitment to a shared life;*
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;*
 - (h) the care and support of children;*
 - (i) the reputation and public aspects of the relationship.*
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.*
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*

(5) *For the purposes of this Act:*

- (a) *a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and*
- (b) *a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.*

Significantly, the Family Law Act imports the cohabitation rule and the menu of factors developed through case law, a menu of factors originally derived from characteristics which had traditionally been regarded as external emblems of marriage. All or some may (but equally may not) be present in most marriages. In Australia however, the existence of a de jure marriage is not defined by the presence or absence of such emblems. A de jure marriage is simply established by the existence of a marriage certificate.

This creates a paradox for people wanting to prove the existence of a de facto relationship: they must behave more like a husband or wife than a de jure husband or wife.

Registration schemes

Proving the existence of a relationship can be an involved process. It may involve presenting the indicia of the relationship – cards, photographs, letters etc gathered over time, the statements of witnesses and the disclosure of personal and often intimate matters.

Recognising this, and recognising that same sex couples are unable to avoid these onerous requirements by marrying, some states have introduced registration schemes.

While these vary from state to state, they generally provide the option of enabling a couple to make declarations that they are in a relationship, and having those relationships registered. In Tasmania the relationships are referred to as “significant relationships”, in Queensland and the ACT they are known as civil partnerships. Provision is also made for the termination or cancellation of these relationships. The various schemes also make provision for the recognition of relationships recognised in other states.

The registration of a relationship under state or territory law is one of the factors the Family Court may take into account in determining the existence of a “de facto relationship” under section 4AA of the *Family Law Act*. Thus registered relationships and civil partnerships can be regarded as little more than a certified form of de facto relationship.

Significantly, unlike marriages, these schemes do not require the parties to the relationship to make any declarations about the nature of their relationship or the commitments they make to each other.

Civil Unions

It is unclear how the civil union alternative proposed by some Members of Parliament would differ from the state and territory based relationship registration schemes, and thus provide for a certified de facto relationship.

The ACT House of Assembly enacted a *Civil Unions Act* in 2006 which described civil unions thus:

- (1) *A civil union is a legally recognised relationship that, subject to this Act, may be entered into by any 2 people, regardless of their sex.*
- (2) *A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage.*¹⁵⁶

The Act did not explain exactly how a civil union differed from a marriage. Nor did the Minister's speech introducing the Bill provide any further information:

“A civil union will be treated in the same way as marriage under territory law. A civil union is not a marriage but will, so far as the law of the ACT is concerned, be treated in the same way. The government is of the view that this is preferable to providing an alternative form of marriage that would not have equal recognition to commonwealth marriage. The civil union is a new concept that can be used by anybody, regardless of gender. It will give couples functional equality under ACT law with married couples but does not replace or duplicate marriage.”

Under the Act, civil unions were established by a public process. Two people established a civil union by making a declaration before a civil union celebrant and at least one other witness in which they both acknowledged that they are freely entering into a civil union with each other.¹⁵⁷

This public process, together with the requirement that civil unions be treated like marriages, was apparently the basis of the Commonwealth's objections to the Bill. What the Commonwealth failed to appreciate is the public process did not require any explicit public commitments, let alone commitments of fidelity and permanence. This process could only be truly equated with marriage if section 46 of the *Marriage Act 1962* did not exist, and a marriage could be solemnised by each partner saying before witnesses “I take you as my husband/wife” or “I marry you”.

The limitations of the alternative schemes

At best, the alternative schemes offer a limited form of functional equality. Couples who do not exercise the option of registering their relationship may be faced with onerous legal proceedings at times of crisis.

¹⁵⁶ *Civil Unions Act 2006 (ACT)*, section 5.

¹⁵⁷ *Civil Unions Act 2006 (ACT)*, section 11.

The various registration schemes are prosaic, austere and do not in themselves recognise the significance which couples may attach to their relationships. While some states have legislated for the recognition of interstate schemes, they lack the portability provided by marriage. They are certainly not as widely understood or accepted as marriage.

Most significantly, they contain no requirements for a couple to make any declaration or acknowledgement about the nature of their relationships. Such schemes need not necessarily exclude the possibility of two people making additional declarations, but these declarations need not involve the same strong commitments required for a marriage.

Of course, not being required to make the same strong commitments may make such schemes a more attractive alternative for some couples. Whether this is the intention of the civil union proponents is another question.

CHAPTER 8:

WHY A CONSCIENCE VOTE ?

We do not want to enter into the partisan controversy about the way in which various political parties conduct their internal affairs in relation to making decisions about when or whether their members of parliament should be free to exercise their individual judgements and cast a vote according to their own considered consciences.

Marriage / Family Law / Human Reproduction

We do however wish to draw to the attention of the Committee the tradition of allowing a conscience vote on matters related to marriage in Australia which was the norm up until the enactment of the Marriage Amendment Act 2004. In our chapter, *Marriage and Family Law as Beneficial Legislation* we have already set out this history. We have drawn attention to the fact that the significance of marriage in our society has always been regarded as fundamental and as touching upon both intimate personal arrangements and basic societal values. Conscience votes were taken on:

- § Matrimonial Causes Bill 1959
- § Marriage Bill 1960
- § Family Law Bill 1974
- § Family Law Amendment Bill 1983

The terms of reference and membership of the Joint Select Committee appointed to inquire into the Family Law Act 1975 was not subject to party discipline. (1978)

The motion on Termination of Pregnancy – medical benefits moved by Mr S Lusher MP was treated as a conscience vote. (March 1979)

During the Howard Government's term of office, conscience votes were taken on:

- § Euthanasia Laws Bill 1996
- § Research Involving Embryos bill 2002
- § Prohibition of Human Cloning Bill 2002
- § Therapeutic Goods Amendment (Repeal of ministerial Responsibility for Approval of RU 486) Bill 2005
- § Prohibition of Human Cloning and the Regulation of Human Embryo Research Amendment Bill 2006.

Other Human Rights initiatives

The original legislation for the abolition of the death penalty (1973) under federal law was initiated by private member's activity and subject to a conscience vote.

The rights of homosexual Australians to be free of discrimination was first raised as a motion for debate in the House of Representatives in October 1973 (proposed by Liberal John Gorton and seconded by ALP member Moss Cass) and passed on a conscience vote 64/40.

In each of these areas of personal life (and death), when the Parliament has sought to legislate, it has traditionally allowed for individual members to exercise independent judgement.

Parliamentary Matters

One of the most fundamental pieces of electoral legislation – the provision for compulsory enrolment/voting was introduced as a Private Members Bill (1924) and voted upon on non-party lines.

Legislation related to the building of a new Parliament House has always been taken as a non-party matter. Both the siting of the Parliament House (Parliament Bill 1974) and the decisions about the eventual construction of the new Parliament House were non-party votes.

We do not believe it would be particularly instructive to list all the occasions on which conscience votes have been agreed by one or both of the major parties, although in summary there have been 31 conscience votes in the federal parliament since 1950, of which the Liberals were granted a free vote on 30 occasions and the members of the ALP on 25.¹⁵⁸

We do however wish to repeat our observation that in areas of family law, marriage and divorce there is a long and honourable tradition of such votes being the norm rather than the exception.

To continue to insist that the only rights in marriage which are to be regulated by party disciplined votes are those which relate to the right of same-sex couples is surely a level of direct discrimination unworthy of the Australian Parliament in 2012.

¹⁵⁸ The Liberals were denied a conscience vote on a motion to change parliamentary standing orders, while they were withheld from the ALP on matters such as the abolition of the death penalty, sex discrimination legislation and the fluoridation of the Canberra water supply.