

2 April 2012

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Senator Crossin, Committee Members,

**Committee Inquiry – Senate Committee on Legal and Constitutional Affairs
Marriage Equality Amendment Bill 2010**

Thank you for the opportunity to provide comments to the enquiry into the Marriage Equality Amendment Bill 2010.

The Inner City Legal Centre is a community legal centre providing a range of free legal services to the disadvantaged in the inner city of Sydney, with a specialist service for members of the Lesbian, Gay, Bisexual, Transgender and Intersex communities across New South Wales.

The centre takes the position that discrimination against people from sex, sexuality and gender diverse communities has no place in Australian law.

We support the proposal for the following reasons:

Changing Nature of Marriage

The cultural and legal nature of marriage has changed fundamentally over the last few decades. The movement against reform is based on a call to ‘protect “traditional” marriage’. The concept of a ‘traditional’ marriage, and the benefits of

Australia legislating, or not legislating, in order to 'protect' it, has no foundation in Australian culture, in fact or in law.

Change to the 'tradition' of marriage, in Australia and internationally has been rapid. The 'institution' of marriage does not resemble what it did a mere century ago. The introduction of no-fault divorce and increased rights for married women are examples of these changes. The Australian cultural experience has also changed with widespread access to televisions, movies and the Internet. The nature of what a marriage is, or should be, has also changed.

History of Marriage

Some of the older, perhaps 'traditional' aspects of marriage remain with us. For example, polygamous marriages performed overseas are recognised as 'marriage' for the purposes of Australian law¹. There is nothing to stop one marrying one's uncle, aunt or first cousin.² State law in NSW allows family lovers, such as cousins, to have sex³ and federal law allows them to get married.

Additionally, 'traditional marriage' recognised the doctrine of coverture, in which a woman lost her legal rights upon marriage. This meant she was unable to own property or work without her husband's permission. Traditional marriage also required a party to prove fault in order to obtain a divorce, and did not believe that sexual assault could occur in marriage. When advocates of discriminatory marriage talk about 'traditional values', we need to be clear about what tradition actually meant.

Given the lack of consensus on what a traditional marriage actually is, it is extraordinary to use legislation to place limits against it.⁴ The current legislative arrangements in fact unfairly target people in same-sex relationships in order to protect a 'tradition' that includes polygamy, incest and discrimination. The reforms suggested by this bill will not allow these controversial 'changes' to 'tradition', because they are already part of Australian law. On the other hand, it is only recently (under the Howard government) that the *Marriage Act 1961* was amended to positively exclude sex, sexuality and gender diverse people from equality. This amendment amounts to unfair targeting of those people in the name of 'tradition'.

The Changing Marriage Ceremony

There are no firm statistics on the way in which people live out their marriage, and this is considered, quite rightly, to be something that is up to the individuals in each marriage (again, of course, as long as it is heterosexual under Australian law). One indication that can be analysed is that of the marriage ceremony, about which statistical data is gathered by the Australian Bureau of Statistics.

¹ Family Law Act 1975, s6.

² Marriage Act 1961 (Cth).

³ Crimes Act 1901 (NSW), s78A.

⁴ Above n2, s88EA.

Australian Bureau of Statistics data shows that 'traditional' marriage ceremonies are now firmly a minority of marriage ceremonies in Australia. In 2007, a civil marriage celebrant, and not a minister of religion performed 70 percent of marriages.⁵ Further, 76.8% of couples were living together before being married.⁶

Again, it is evident that the nature of marriage has changed, the majority of Australians now reject the 'traditions' and a failure to reform would be out of step with community expectations.

Basis in Law

The changing nature of marriage, and the need to move away from 'stereotypical'⁷ and normative understandings of what relationships are, and how they work, has been considered judicially. In the case of Kevin⁸ before the Family Court of Australia, following an extensive review of ancient Christian rites of marriage, the court rejected that kind of 'tradition' as a pertinent factor in considering what 'marriage' is.⁹

The case of Kevin was a case about a transgender man, married to 'Jennifer'. It was deemed by the court that this marriage was valid, in spite of the fact that 'Kevin' had not undergone genital surgery. Chisholm J of the Family Court of Australia found at first instance that the marriage was valid and the Full Court of the Family Court upheld this decision.

The decision in Kevin is relevant to the consideration of this bill for three reasons. The first is that the arguments advanced on behalf of the Attorney General in the Full Court appeal stressed the 'traditional' aspect of marriage and these arguments were rejected by the court, in favour of accepting that the nature of marriage has indeed changed.¹⁰ The second is that the findings of both Chisholm J and then later by the Full Court, rejected the idea of tradition forming the basis of a definition of marriage. In particular, their Honours found that:

We think that there is force in the submission of Mr Basten QC on behalf of the Human Rights and Equal Opportunity Commission that the resort by the Attorney-General to terminology describing marriage as a social institution, having its origins in ancient Christian law, can readily disguise stereotypical assumptions and perspectives on the nature of modern marriage relationships.¹¹

In our submission, their Honours are correct in recognising the disconnect between ancient law and modern Australian law, which operates in a pluralistic

⁵ Australian Bureau of Statistics 3306.0.55.001 – Marriages, Australia 2007, issues 30/09/2008 available as electronic resource <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3306.0.55.001> last accessed 12 March 2012.

⁶ Ibid.

⁷ Attorney General for the Commonwealth v Kevin and Ors (2003) 30 Fam LR 1, [70].

⁸ Above n7.

⁹ Above n7,

¹⁰ Above n7, [63].

¹¹ Above n7, [70].

society. The social institutions, like the legal ones, have changed and need to change. This has been true of every other 'institution' in life.

The third reason why the decision of *Re Kevin* is relevant is that it indicates the impact of 'gay and lesbian' law reform on sex and/or gender diverse people.

Transgender, intersex and sex and/or gender diverse people are the hidden victims of a discriminatory marriage law.

Transgender and Intersex People

Much of the public debate on the bill has focused on same sex couples, without acknowledging the overlap with transgender and intersex people. Following the Attorney-General's logic in *Re Kevin*, Kevin would always remain a woman and therefore could not marry a woman. However, he would be able to marry a man, thereby entering a same sex marriage.

Many transgender people find themselves in an uncertain position around marriage. For example:

- A transgender person who has transitioned and holds a new birth certificate would be uncertain about the status of their marriage to an opposite sex partner
- A transgender person may wish to marry their same sex partner using their old birth certificate, meaning the marriage is 'heterosexual' in theory but gay or lesbian in practice, and
- A marriage where one person transitions is placed in a position where the couple must separate if the transgender partner wishes to amend their birth certificate

As long as the definition of marriage contains gender restrictions, transgender people will be excluded and the status of their marriages will be uncertain.

Any consideration of marriage law should also consider the legal status of Intersex people. There is one Australian case involving marriage and an intersex person, *In the Marriage of C and D (Falsely called C)*.¹² In this case, the husband was an Intersex person, who lived as a man. The Court found that the husband was neither a man or a woman under Australian law, and therefore was unable to marry anyone. While it is unclear whether the Court would make a similar determination today, this case raises basic questions of human rights.

The ruling in *Kevin*¹³ disapproved the ruling *C and D*. The finding in *Kevin* would have the effect that if an intersex person were to adopt a gender and fulfill the indicia set out in *Kevin*, then that person would be entitled to marry someone of the opposite gender. As it currently stands, the Marriage Act denies Intersex people the right to marry unless they go through that process. This is a fundamental breach of the rights of Intersex people. The only way to ensure that marriage is accessible to Intersex people is to introduce gender-neutral definitions into the Act.

¹² *In the Marriage of C. and D. (Falsely Called C)*, 35 Fed L Rep 340 (Family Court of Australia 1979).

¹³ Above n7.

Christian Approach to Marriage

The need to change is also recognised amongst Australia's Christian communities. There are several Protestant denominations that practice same-sex marriages (though these are not recognised by law, with its attendant problems of legal recognition, they are not illegal per se) and there are gay Catholic movements as well. The amendments proposed in this Bill will not alter that position and traditional Christian movements will, as per their option, be able to practice those ancient Christian rites as described in Kevin and indeed the Bible at their option and in exactly the same way as they are now. The only difference will be the legal rights that are afforded to the participants in marriages. Those Christian churches that do accept and include gender and sexuality diverse people will also continue to do what they are currently doing. Adherents to any of Australia's many faiths may continue to worship in exactly the same ways that they do now. This reform will not impact the operation of religion, or religious practice in Australia.

Certainly, for historical and cultural reasons it is important that the option of traditional marriage, using traditional rites, is made available in a pluralistic society, such as Australia's. This issue is fairly canvassed and recognised in item 4 (ss46 (1)) of the Bill. However it must also be recognised that statistically, the majority of Australians do not subscribe to the formula presented by proponents of the traditional marriage. For this reason it is important that all Australians are given the opportunity to participate in love, and institutions of love, without legal interference.

Equal Access to Law

It is part of the Anglo-Australian legal tradition that all persons are equal before the law. The objects of the bill, include at clause 3 sub clause (b) to

Recognise that freedom of sexual orientation and gender diversity are fundamental human rights

And at sub clause (c):

[To] promote acceptance and the celebration of diversity.

It is important, from this perspective to defend the tradition of equality before the law upon which our legal system is based. Other similarly advanced common law jurisdictions such as Canada, parts of the United States and South Africa have made these legislative reforms. This has followed the lead given by advanced civil law jurisdictions such as the Netherlands and Belgium to legislate in favour of equality. Australia drags behind similar legal jurisdictions around the world and

it is an important issue for Australia's international legal reputation to allow these reforms.

Recent state and federal law reforms have removed certain types of institutionalised discrimination against same-sex attracted and gender diverse people¹⁴. The reforms have been piecemeal and have used de-facto status as a determinant of rights.

A heterosexual couple could, hypothetically, have a marriage that lasts as little as a year.¹⁵ On the basis of this short relationship, solemnised by a law, the hypothetical heterosexual couple are able to be recognised at law for all matters including superannuation, powers of attorney and other matters. On the other hand, for the purposes of the Family Law Act (ie under Federal law) there are at least nine indicia that can be taken into consideration in determining whether or not a de-facto relationship exists.¹⁶ These issues are canvassed below in a case study, based on a real story.

Equality Before the Law and the Legal Questions Raised

In many parts of the world, marriage equality has become law. In comparing Australia to those jurisdictions that do have marriage equality, a distinction needs to be drawn between systems of law.

The first nations that legalised same-sex marriage were civil law jurisdictions, such as the Netherlands and Belgium. These nations, comparable in economic and social status to Australia, were followed by other civil law jurisdictions like Spain, Portugal and Argentina and will soon be joined also by Norway.

Marriage in the Australian Legal System

Among common law nations, of which Australia is one, the path to marriage equality has largely been in the courts.¹⁷ The reason that these kinds of challenges have been successful, including in the United States, Canada and South Africa, is because of constitutional documents that enshrine equality before the law. In several United States jurisdictions and Canada, for example, it has been found that bans on same-sex marriage have been unconstitutional or a breach of fundamental rights to equality.

Because of the nature of Australia's federal system, this kind of reform is not possible. Because marriage is a Commonwealth responsibility per s51 of the Constitution, equality in marriage falls outside the ambit of various human rights

¹⁴ See eg Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth); Miscellaneous Acts Amendment (Same Sex Relationships) Act (NSW) 2008

¹⁵ Family Law Act (Cth)1975, s48.

¹⁶ Above n1, s4AA. See also, for example, the definition of de facto under NSW Law, Interpretation Act (NSW) 1987, s21C. Each state has their own definitions of de-facto and interpretation rules regarding de-facto relationships. Each state and territory (except SA, WA and NT) have relationship registers in lieu of federal reform of the Family Law Act, which is Commonwealth legislation.

¹⁷ See eg Goodridge v Massachusetts Department of Public Health (2003) 798 NE2d 941; Minister for Home Affairs v Fourie (2005) CCT 60/04; Barbeau v British Columbia (2003) CA029048, Halpern v Canada [2003] OJ No2268.

legislation such as the Victorian ‘Charter of Human Rights and Responsibilities’ or the Human Rights Act 2004 (ACT). At a federal level there is no guarantee of equality before the law, and this is based only on tradition. Unlike marriage, if this question is to be viewed from standpoint of human rights and equality, the Commonwealth government is limited in its approach, it can only make those laws which follow international treaties and conventions using the foreign affairs power of the constitution.¹⁸ The far more direct route to equality and the protection of human rights is amendments to the Marriage Act 1961, which the Commonwealth government has direct constitutional power to change.¹⁹

The argument about Australia having a bill of rights, like other jurisdictions that are similarly economically and socially advanced, has stretched over a number of years. It is through challenges to documents such as bills of rights that overseas jurisdictions have been able to achieve reform.

Australia is in a special situation. We are one of the world’s most advanced countries and, like our friends in other parts of the world with whom we share values of equality before the law, and equal rights for citizens.

However, without formal documents that guarantee equality, Australia, unlike our friends in Canada, the United States and South Africa, require our parliamentary lawmakers to be specially careful to ensure that human rights, including equality, are protected to the standard expected by the Australian people.

As it relates to this issue, polling suggests that around 60% of Australians are in favour of marriage equality.²⁰ Australians expect equality before the law and we expect our law makers to protect those values.

Case Study

Abdul and Yulin²¹ were in a same-sex relationship for forty years. Both Abdul and Yulin were in the 80s and both suffering from dementia when Yulin died and was survived by Abdul. The house in which they had lived for the last 30 years was in Yulin’s name.

After Yulin died, Abdul, a frail man suffering from advanced dementia was left in the house. Upon hearing of his death, Yulin’s daughter made a claim on the house.

Because Yulin and Abdul were not married, Abdul was in a position of having to prove that the relationship existed. Yulin’s daughter claimed that he was a ‘lodger’ in the house and that there was never a romantic relationship.

¹⁸ Constitution of the Commonwealth of Australia s51(xxix).

¹⁹ Ibid (xxi).

²⁰ See eg National Galaxy research poll, conducted for Australian Marriage Equality, 2009. Polls results available at <http://www.australianmarriageequality.com/Galaxy200906.pdf> last accessed 16 March, 2012.

²¹ Names changed to protect identities.

If Yulin and Abdul had been married in the first place, there would be no question of the relationship between them. Under the current law there would need to be proceedings in the Family Court of Australia for Abdul to demonstrate that a relationship existed. Given his age and disability this is nothing something that Abdul was in a position to do and yet if he did not he would be facing homelessness.

The case study of Adul and Yulin is based on a real situation at the ICLC, with the names changed. Unfortunately this is a very common situation that we often see at the Centre.

Case Study

Mike and Layla have been married for 10 years. Mike tells Layla that he is transgender, and begins to live her life as Michelle. Their marriage survives and they agree to stay together. Michelle has sex reassignment surgery and now lives her life as a woman. However, Michelle is unable to change the record of her gender on her birth certificate, as state law requires her to be unmarried before she can do this. However, in order to get a divorce, Michelle and Layla must swear or affirm the Application for Divorce, stating that their marriage has irretrievably broken down. They cannot do this, as their marriage is intact. This means that Michelle must maintain a male birth certificate.

Case Study

David is an Intersex person. He would like to marry his female partner Shae, but is unsure whether the law will allow him to do so, because the law does not regard him as either a man or a woman.

International Aspects

The ban on marriage has a particularly unfair impact on people who have come to Australia from other countries. Australia is a nation that celebrates cultural diversity. We have always recognised the traditions of people who come from overseas and this needs to be extended to changes in those traditions. It is not logical to not to extend that spirit of cultural generosity to those who are in a relationship and come from overseas.

As mentioned above, polygamy performed overseas is recognised as a valid marriage in Australia. This must also be true for people who come to Australia from parts of Europe, North and South America. Through technology the world is getting smaller and more international relationships are beginning, and ending between people from different countries. Australian law must be robust enough to keep pace with these relationships and same-sex marriage is an international legal reality.

We urge committee members to consider that equality is a fundamental pillar upon which Australia law and society is based. Arbitrary discrimination does not do justice to that tradition and Australia lags behind similarly advanced countries around the world. The basis for this is the insistence by what is now a minority in the community to uphold 'traditional' marriage.

If you have any questions regarding this submission please contact the Centre Director,

Yours Sincerely,

Daniel Stubbs
Director