

Submission to the

**Senate Legal and Constitutional Affairs Committee
Inquiry into the Marriage Equality Amendment Bill
2010**

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Submitted by

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1. INTRODUCTION

In this submission I have sought to outline the key reasons that I endorse the Marriage Equality Amendment Bill 2010. Firstly, I believe such reform is appropriate as it reflects the desires of the majority of Australians. This is discussed at 2.1, below. Secondly, and more importantly, I believe that marriage equality is a matter of fundamental human and civil rights. At 2.2 I submit that the current state of the law denies same-sex couples the same human rights and legal protections that are granted to other Australians. This institutionalised discrimination has a serious impact on the mental and physical health of same-sex couples and their families, and encourages discrimination in other areas. Here I also explain why I do not believe that civil unions are a viable alternative to marriage equality. At 2.3 I outline the economic advantages associated with the Marriage Equality Amendment Bill 2010, primarily the boost to the economy through increased spending on weddings. This is likely to be in the range of \$161 million to \$742 million over the three years after the Bill enters into law. Finally, at 2.4, I submit that passing the Bill would be beneficial to Australia's international reputation.

In the second part of this submission, I address some of the major arguments employed by opponents of marriage equality: that it will harm children (see 3.1, below), that it is contrary to religious beliefs or freedoms (see 3.2), that it will demean the institution of marriage or destroy tradition (see 3.3) and finally that it will open the door to other types of "marriage" (see 3.4). I submit that many of these arguments are logically flawed and are not relevant to the merits of the Marriage Equality Amendment Bill 2010. None of them are strong enough to justify the continued denial of rights to a class of people on the basis of their sexual orientation.

2. THE CASE FOR MARRIAGE EQUALITY

2.1 Representative democracy

In a system of representative democracy, such as that in Australia, it is the duty of an elected official to give considerable weight to the opinion of his or her constituents. Polls have consistently shown that a majority of Australians support same-sex marriage. A February 2012 Galaxy poll showed 62% support, a result consistent with earlier polls.¹

This indicates that it is the duty of the Members of Parliament to represent the views of the people by legislating for marriage equality unless, in their unbiased opinions, there are real and serious reasons that this would be contrary to the interests of their constituents. There may be situations in which an elected representative, for reasons of his or her conscience and judgment, should make a decision that is not in line with popular support. It is submitted that this does not justify a decision not to reform the current marriage laws, however. As discussed below, there are moral and ethical considerations that indicate that

¹ Josephine Tovey, "New poll backs same-sex marriage", *Sydney Morning Herald*, February 13, 2012, smh.com.au.

marriage equality should have the support of the Australian Parliament regardless of popular opinion. There is also evidence that marriage equality would be beneficial to society as a whole, and as such is in the best interests of all Australians.

2.2 Human rights

Marriage is recognised, domestically and internationally, as a fundamental human right. Article 16(1) of the *Universal Declaration of Human Rights* (UDHR) states that “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.” Subsection 3 states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The very fact that marriage is governed by legislation in Australia, and confers rights and obligations on married individuals, indicates that it is not merely a religious or cultural institution. It is a civil institution and a civil right. Article 16 of the UDHR is silent on the issue of same-sex marriage. This is not to say to homosexual individuals do not have the same rights as heterosexual individuals, however. Article 2 of the UDHR clearly states that “[e]veryone is entitled to all the rights and freedoms set forth in this declaration, *without distinction of any kind*” (emphasis added).

The principles of equality and individual liberty are extremely important to Australia’s society and political system. These are fundamental values for a liberal democracy. The policy of denying same-sex marriage is contrary to these values. The Australian Parliament has recognised in other contexts that individuals should not be denied rights or opportunities on the basis of sexual orientation. Under the *Australian Human Rights Commission Act 1986* (Cth) employers may not discriminate on the basis of sexual orientation. Such discrimination is no more acceptable in the context of marriage laws.

Denying Australians in same-sex relationships the right to marry is to deny them legal protections and benefits that are available to opposite-sex couples. The advantages enjoyed by married couples are not only those enshrined in law. For example, it may be more difficult for a de facto partner than a legally-recognised spouse to demonstrate to hospital staff that they are a family member of their injured partner, or that they should have the right to make emergency medical decisions for that person. Some airlines may only allow “frequent flyer” points to be shared with a husband or wife, or with a son- or daughter-in-law. These difficulties stem from the societal perception of marriage as an important civil institution, and as the highest level of commitment to a romantic relationship. These societal values mean that equality can only be achieved by making marriage available to all Australian couples.

Although relationship registers and civil unions are a definite improvement, they do not overcome all of the problems created by a denial of marriage equality. I want to make it very clear that *civil unions are not a compromise that will please both supporters and opponents of marriage equality*. Firstly, in many countries they have not offered the same legal benefits to same-sex couples as marriage does to opposite-sex couples. These benefits include tax benefits, social security

rights and adoption rights.² For the reasons discussed in this submission, all Australian couples in a committed relationship should be able to be granted the complete range of benefits granted by marriage. Civil union schemes have usually failed in doing this. The process of introducing such a scheme in Australia at a Federal level would require discussion of whether all rights accorded to married couples would be granted to couples who enter into civil unions. Most of the arguments raised by opponents of marriage equality (addressed below) would also apply to granting any form of equal rights to same-sex couples.

Secondly, and more importantly, it is not simply the practical difficulties faced by same-sex couples that make marriage equality an imperative. The fact that homosexual relationships are treated as different to heterosexual relationships under the law is problematic in itself. These relationships are not different in any meaningful way. The individuals in these relationships are not lesser people with diminished rights. Males and females are biologically different, but they are treated equally before the law in Australia, on the principle that all people are equal.

The different treatment of same-sex relationships causes societal harm. The Australian Psychological Society has supported marriage equality on the basis that marriage has been scientifically linked to mental health benefits.³ Additionally, discrimination and social exclusion are harmful to mental health. Institutionalised discrimination, especially the denial of marriage equality, has been directly linked to mental and physical health problems experienced by same-sex attracted people.⁴ There is also a growing body of evidence that married people have fewer health problems and live longer than single or even cohabiting peers. There have been studies linking marriage to lower rates of heart disease, stress and even drug use. It is clear that marriage provides physiological and psychological benefits to couples that simply living together in a committed relationship does not provide.

Creating a legal distinction between same-sex and opposite-sex couples encourages discrimination in other areas. It enforces the view that people should be treated differently on the basis of sexual orientation. Studies have shown that same-sex attracted people experience a high level of discrimination in all areas of life, including hate-motivated assaults.⁵ As discussed above, this discrimination has a serious impact on the lives, health and happiness of same-sex attracted Australians.

² S Wilkinson and C Kitzinger, 'Same-sex marriage and equality' (2005) 18(5) *The Psychologist* 290, at p. 291.

³ M Rout, "Psychologists urge support of gay marriage as beneficial to mental health", *The Australian*, 23 December 2011, www.theaustralian.com.au.

⁴ G. Herdt and R. Kertner, 'I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States' (2006) 3(1) *Journal of Research and Social Policy* 33; M. L. Hatzenbuehler, K. A. McLaughlin, K. M. Keyes and D. S. Hasin, 'The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Population: A Prospective Study' (2010) 100(3) *American Journal of Public Health* 452.

⁵ G. Mason, 'Violence against lesbians and gay men', *Australian Institute for Criminology* (1993), <http://www.aic.gov.au/documents/D/2/2/{D22F8857-A477-4BA0-BAB8-5C04C2B1E7E9}vpt2.pdf>.

Finally, it should be noted that it is not just the individuals in same-sex relationships who are the victims of this discrimination. There are many families in Australia in which same-sex couples are raising children. This will be the case regardless of whether the Marriage Act is reformed. The children in these families are also directly affected by whether their parents are granted equal rights. This may have both legal consequences for the family as well as psychological consequences for the children whose family is not recognised as “equal” to families with married opposite-sex parents.

2.3 Economic benefits

A number of studies have indicated that introducing marriage equality would result in increased spending on weddings and related costs, resulting in a boost to the economy. This is especially true where nearby jurisdictions (such as New Zealand) have not legalised same-sex marriages, as same-sex couples looking to marry may travel to Australia to do so. A recent report by the Williams Institute (available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/economic-impact-extending-marriage-australia/>) estimated that the Australian economy would receive a boost of \$161 million over three years.⁶ This could be as much as \$742 million if couples travelling to Australia to marry are factored in.

Above, at 2.2, I discussed the physical and psychological problems linked to the denial of marriage equality. It is obvious that reducing physical and mental illness in the Australian population will help ease the pressure on an increasingly underfunded and overstrained health system. This will likely lead to significant long-term savings. Additionally, reducing discrimination generally – by removing any discriminatory legislation and encouraging the social perception that all Australian citizens are equal – will lead to a reduced need to turn to the legal system to resolve issues that arise. Recognising marriage in same-sex relationships may also make individuals’ rights more clear upon the breakdown of a relationship, potentially simplifying any legal dispute that follows.

It is rare to find such a simple legislative change that could create significant economic benefits and, best of all, that costs nothing to implement. There will be almost no offset to this benefit, as same-sex couples likely to marry would already be receiving tax, superannuation and/or pension benefits by merit of their de facto or civil union status. When the economic benefits are considered, marriage equality clearly directly benefits all Australians.

2.4 Australia’s international reputation

A growing number of countries have now legalised same-sex marriages, including major trading partners and allies such as Canada, and an increasing number of US states. Australian politicians and the Australian people have

⁶ M. V. Lee Badgett and J. Smith, ‘The Economic Impact of Extending Marriage to Same-Sex Couples in Australia’ (2012) The Williams Institute, <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/economic-impact-extending-marriage-australia/>.

traditionally been quick to criticise human rights failings by other nations. On the whole, we have a good record in this area. It would be unfortunate to tarnish this reputation with institutional discrimination against same-sex attracted Australians. I have no doubt that we will one day look back on this debate in the same way that we look back on the fight for female suffrage, or to end discrimination against Indigenous Australians. I believe that within generations we will wonder how it could have taken us so long to accept something so basic, how we could have treated a large part of our population as if they are not full citizens, or full human beings. I hope that when we look back, we can do so with pride knowing that we put an end to this discrimination. I hope that in the next few years, other countries will look to us as a human rights leader, rather than as backwards and discriminatory.

3. ADDRESSING THE ARGUMENTS AGAINST MARRIAGE EQUALITY

3.1 We must protect the children

3.1.1 There is no legal link between marriage and children

This argument is disingenuous and irrelevant. *In Australia, there is no direct link between marriage and raising children.* There is nothing to stop non-married people from having children, as many do, and nothing to stop married people from choosing not to have children. In fact, the proportion of children born outside marriage is increasing.⁷ We do not deny marriage to infertile people, or those who don't want children. We don't even deny marriage to those with a record of domestic abuse or neglect, those who arguably *shouldn't* have children. This is because marriage, in a legal sense, is not about raising children.

There are many same-sex couples currently raising children. A lack of marriage equality has not prevented this, so it does not make sense to argue against marriage equality on these grounds. The proposed marriage reforms are only about whether existing relationships should gain legal recognition. As such, arguments about homosexuality generally, such as whether same-sex couples should be able to raise children, or whether same-sex attraction should be discussed in schools are not relevant to this debate.

3.1.2 There is no evidence that children with same-sex parents are disadvantaged

Even if marriage had any legal connection to child-rearing, children with gay, lesbian, bisexual or transgender parents are not in a worse position than their peers. In 2007 the Australian Psychological Society compiled and summarised research on same-sex parenting, concluding that it is likely to be just as

⁷ Australian Bureau of Statistics, Couples in Australia. See doc. no. 4102.0, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009>.

favourable as opposite-sex parenting.⁸ *There is no evidence that children raised by a same-sex family are worse off than those raised by heterosexual parents.*

Even if it was true, as some people claim, that the best environment for children is a nuclear family with their biological mother and father, this is not the reality for many children. Many children are born to parents who are not married, and many are raised by single parents. Surely it is preferable that a child be raised by two mothers rather than just one?

In fact, children currently being raised by same-sex parents will actually be advantaged by marriage equality. In 2.2, above, I outlined the mental and physical affects of denying marriage equality on both parents and children in same-sex families. Marriage equality will help these children by reducing stigma against their families and reducing the harmful affects of discrimination on their parents.

3.2 It is against my religion

3.2.1 Separation between church and state – marriage in Australia is a civil institution

There has always been a distinction between civil and religious marriage under Australian law. Divorce is legal, for example, although my faiths do not recognise divorce. Polygamy is not legally recognised although Islam, a major world religion, recognises polygamous marriages. People of different faiths may marry each other. Marriages may occur without any religious aspect: the majority of Australian marriages are now performed by a civil celebrant.⁹

This is because marriage is recognised as an important civil and social institution, one that accords legal rights and obligations. Under the law, it is separate from religion. This is not to say that marriage is not also an important institution to many religions also. Legalising same-sex marriage will not change this, just as legalising divorce did not stop certain religious groups from refusing to support, encourage or recognise divorce within their church or community. In none of the countries with marriage equality have religious marriage celebrants been forced to conduct same-sex marriage ceremonies. Marriage celebrants in Australia are not forced to marry anyone they do not wish to.

The proposed reform to the Marriage Act is not attempting to alter the religious significance of marriage, or what marriage means to any given person or faith. This would be impossible: marriage means different things in different religions. Many religious views of marriage already do not accord with the legal definition. This should not be a concern when determining civil rights.

⁸ E. Short, D. Riggs, A. Perlesz, R. Brown and G. Kane, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: a literature review prepared for The Australian Psychological Society* (2007), Melbourne, <http://www.psychology.org.au/Assets/Files/LGBT-Families-Lit-Review.pdf>.

⁹ Australian Bureau of Statistics, *Marriages and Divorces*, Australia, 2008. See doc. no. 3310.0, <http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/3310.0Main%20Features22008?opendocumentandtabname=Summaryandprodno=3310.0andissue=2008andnum=andview=>

3.2.2 Denying marriage equality limits religious freedom

In fact, it could be argued that it is actually the denial of marriage equality that limits religious freedom. This is because there are religious groups which support marriage equality, and feel that all loving couples should have the right to marry. The Quakers are one example. Australian Quakers already celebrate the spiritual aspects of same-sex weddings, and are in support of reform to the Marriage Act.¹⁰ This is consistent in their spiritual belief in the equality of all people. Denying this equality is contrary to their religious beliefs.

3.3 It will demean the institution/destroy tradition

Arguing that marriage equality will “demean” the institution of marriage is highly offensive. It suggests that current marriages will somehow be degraded or made less meaningful. There is no evidence of this in countries with marriage equality. In fact, these are the very arguments that were used to oppose female suffrage. Some men felt that their status in society would somehow be degraded by granting equal rights to women. This was clearly not the case. It is obvious in retrospect that these arguments were solely based in prejudice and fear. There is nothing to suggest that it is any different in this case. It is certainly not a good enough reason to restrict the human rights of any person.

In fact, marriage has changed significantly over the years. This has not destroyed its worth, or the importance it is felt to have. The impassioned arguments for and against marriage equality demonstrate that marriage is still a very important institution. It is only in recent decades that rape has stopped being legal within marriage. It was not so long ago that women lost legal and property rights upon marrying, or that divorce was not allowed or was only permitted in certain narrow circumstances. It is only fairly recently in the history of human civilisation that marriage was not primarily about inheritance of property, producing children, enforcing religious identity, creating ties between families for political or business reasons, etc. Arranged marriages were common for these reasons. If the institution of marriage had not undergone changes it would no longer be considered so relevant and valuable to modern Australians. For this reason I argue that marriage equality will strengthen the institution of marriage, not weaken it.

3.4 It will lead to other types of “marriages”

This is perhaps one of the most ridiculous and insulting arguments that has been made by opponents of marriage equality. Some have argued that it will create a “slippery slope”, leading to incest, polygamy and even marriages to pets or household items.

Marriage is a legal relationship that may only be entered into by consenting adults. This will not change with allowing same-sex couples to marry. It certainly will not allow people to marry a dog or mobile telephone, or even a child. Only

¹⁰ Press release, ‘Quakers call for legal recognition of same sex marriages’, 11 January 2010, <http://www.newsmaker.com.au/news/2189>.

adult human beings with the legal capacity to make such decisions will be able to marry.

There is also no reason to assume that it will lead to incest. Opposite-sex couples in incestuous relationships are not allowed to marry at present. Amongst other reasons, incest is illegal (whether within marriage or outside it) because it can lead to genetic deformities and health problems for any children that are born to closely related parents. No country that has legalised same-sex marriage has legalised incest. We already recognise same-sex relationships in many contexts, such as in determining social security benefits, but we do not recognise incestuous relationships.

The final form of this argument relates to polygamy. There are also policy reasons for polygamy remaining illegal in Australia. There are, for example, concerns that polygamous relationships are often associated with the exploitation of women. Polygamy is legal in many countries, but is not recognised in any of the countries that recognise same-sex marriages. In fact, many of the countries that recognise polygamy are those that are least tolerant of people who are homosexual, bisexual or transgender. There is no link between legalising same-sex marriages and legalising polygamy. There is also no logical reason to believe that legalising same-sex marriage will lead to support for legalising polygamy. The same arguments do not apply to both types of change. Preventing polygamy is not denying basic human rights to a class of people on the basis of a characteristic like sexual orientation.

At any rate, all of these arguments are missing the point. The proposed reform *only concerns same-sex marriage*. It does not, in itself, open up the doors to any other extension of the institution of marriage. The only reason the “slippery slope” argument is used is because there are good reasons to oppose these other forms of “marriage”; *but, that is precisely why marriage equality will not lead to their legalisation*. Any further change would have to be debated just like this one, and approved by Parliament just like this one. There is no reason to expect it will succeed as long as there are strong reasons to oppose it. This is not the same as strong reasons to oppose same-sex marriages.

4. CONCLUSION

In conclusion, I submit that there is no compelling reason to continue to deny basic human and civil rights to a class of people based on a characteristic such as sexual orientation. This is unjustifiable discrimination, which does not just affect people in same-sex relationships. Australian society as a whole would be advantaged by the reforms contained in the Marriage Equality Amendment Bill 2010. As well as bringing economic benefits it will promote a more tolerant society, and protect against the mental and physical harms caused by discrimination. It is a reform that is simple and inexpensive (if not free) to implement. Scientific studies support the conclusion that is likely to have highly positive outcomes. For these reasons I fully endorse the Marriage Equality Amendment Bill 2010 and any initiatives to end discrimination in marriage laws on the basis of sexual orientation.