2 April 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

To the Committee Secretary

Thank you for inviting submissions in relation to the Marriage Equality Amendment Bill 2010 (the "Bill"). Please find my submissions on this topic below.

The Bill purports to "create the opportunity for marriage equality" by, in essence, rewriting the definition of marriage in the *Marriage Act 1961* (Cth) so that it is non-gender specific. I submit that this is an inappropriate alteration to make to the legal definition of marriage. I do so for three reasons:

- the Federal parliament currently lacks the constitutional power to enact the Bill;
- the Bill will lead to an expansion of same-sex adoption, which will have negative flow-on affects for the children involved as well as society in general; and
- the Bill will indirectly erode religious freedom and freedom of speech.

The Constitutionality of Same-Sex Marriage Legislation

Before discussing the merits of the Bill there is a more fundamental question that must first be answered: does the Federal parliament possess the constitutional power to enact it? As things currently stand, the answer to this question is probably "no".

The Federal parliament has direct legislative power in the area of marriage.[1] This power is found within s 51(xxi) of the Constitution, which states simply that the Federal parliament may legislate with respect to "Marriage". Does the concept of same-sex "marriage" fall within the constitutional definition of "marriage" so as to enliven Federal legislative authority through the marriage power? To answer this question we must look to the intentions of those

[1] The other constitutional head of power the Federal parliament might invoke to support the Bill is the ubiquitous external affairs power: see s 51(xxix) of the *Commonwealth Constitution*. Use of the external affairs power would fall down in this case because Australia is not currently party to any international obligations that require it to provide same-sex marriage to its citizens.

who drafted the Constitution. In other words, we must put aside our own ideas and instead attempt to deduce what the drafters of the Constitution understood "marriage" to mean. As Justice McHugh stated in the High Court case of *Re Wakim; Ex parte McNally* ("*Wakim*"):

> [T]he judiciary has no power to amend or modernize the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary … is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.[2]

It is abundantly clear that, at the time of Federation, the definition of marriage was encapsulated in the prevailing (and still current) common law formula found in *Hyde v Hyde and Woodmansee*: "the voluntary union for life of one man and one woman to the exclusion of all others".[3] This is certainly the understanding of "marriage" that the drafters of the Constitution would have held as they set out the marriage power in s 51(xxi). The conclusion, then, seems relatively straightforward: the marriage power permits the Federal parliament to legislate with respect to heterosexual marriage alone. Accordingly, any attempt by the Federal parliament to enact same-sex marriage legislation should be seen as being unconstitutional.

Interestingly, Justice McHugh appeared to reach this same conclusion in *Wakim*. Here he used the case of same-sex marriage[4] as a means of illustrating the distinction between "general" and "more specific"[5] constitutional words and phrases. According to Justice McHugh, many words and phrases in the Constitution ("external affairs", for example) are expressed in such general terms that the drafters of the Constitution must have intended "that they should apply to whatever facts and circumstances succeeding generations thought they covered."[6] Conversely, there are other words and phrases in the Constitution that are expressed at a much lower level of abstraction; and Justice McHugh seems to suggest that these words and phrases should be interpreted in a much more literal fashion. He gives as an example of a less abstract term the word "marriage":

> [I]n 1901 "marriage" was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably "marriage" now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others.[7]

Although the precise meaning of this passage is open to debate, Justice McHugh seems to be suggesting that, at the very least, the word "marriage" is not a general term that is so broad (as is, for example, "external affairs") that it must be redefined and reinterpreted by succeeding generations; and that, at least for now, its correct level of abstraction is that

---

[2] (1999) 198 CLR 511, 549.
[3] (1866) LR 1 P & D 130, 133 (Lord Penzance).
[4] Albeit in a section of his judgment that is, admittedly, *obiter dicta*.
[5] These are my terms rather than those directly employed by Justice McHugh.
[6] *Wakim* (1999) 198 CLR 511, 552.
[7] Ibid 553 (emphasis in original).

intended at the time of Federation. The logical outcome of this is that, even *if* the societal understanding of "marriage" is changing the constitutional conception of it is not – with the consequence that the Federal parliament currently lacks the constitutional power to legislate in relation to same-sex marriage.

The Rights of Children

In addition to the threshold issues of constitutionality already considered, a range of moral objections that can be brought against the Bill. I will discuss just two of them below, beginning with the ethics of same-sex adoption and the danger that the Bill will increase the incidence of this practice.

The "traditional" family unit comprises two married adults (of opposite sexes) and their biological children. This is self-evidently the optimal family arrangement. The "marriage" component ensures that both parents should (excepting the unfortunate reality of divorce) "stick around" to raise their children, and the "opposite sex" component ensures that the children will have access to both a mother and father.

It is this latter "opposite sex" component that differentiates heterosexual marriage from same-sex relationships. No matter how much two lesbians might love their adopted child, they cannot be a father to that child – and vice versa for homosexuals in relation to mothers. Neither can two lesbians or two homosexuals model to a child how a man and a woman should interact – which is another key role performed by heterosexual parents. Children need both a mother and a father, and research shows that they do best when raised by both biological parents.

My concern is that, with the enactment of same-sex marriage legislation, homosexual and lesbian couples will gain unrestricted access to adoption services. I worry about the children who are being (and will be) raised by same-sex couples – what will the long-term psychological effects on these children be? At this stage we just don't know. I am also concerned that the rights of the children whose lives are being (and will be) affected by this debate are being overlooked. Children are not possessions or toys or even something that one can have a "right" to. When considering matters involving children we must look not to what we think might fulfil *us* but rather to what is in the *children's* best interests. Same-sex adoption is not in the best interests of the children involved as it forces them (as children do not have the capacity to "consent" to being adopted by a same-sex couple) to live under a parenting arrangement over which significant marks questions still exist, in addition to denying them that most fundamental aspect of humanity – having a mother and a father. If same-sex marriage leads to an expansion of same-sex adoption, then this is a very good reason to oppose it.

Religious Freedom

A further moral objection can be raised against the Bill from the perspective of religious freedom. We can begin by noting that rights are never created in isolation. It is invariably the case that, when a new right is allocated, some of the rights enjoyed by others are quietly withdrawn to make way for the new right. In this way the "rights game" creates "winners" and "losers".

My concern is that recognising same-sex marriage will create "losers" in the areas of religious freedom and freedom of speech. We have already seen how, in jurisdictions that have adopted same-sex marriage, the legal change has been accompanied by a vigorous "public re-education" campaign.[8] It is now becoming clearer that the ultimate goal of same-sex marriage campaigners has not been merely to gain access to the institution of marriage – rather, the goal has always been to completely "normalise" homosexuality in society. To achieve complete normalisation, any dissenting voices and perspectives must be silenced. Sadly, it is not difficult to foresee the enactment, in a post-same-sex marriage world, of "hate speech" legislation making it illegal for people to claim that being homosexual is sinful. I can imagine the Federal government, somewhere down the track, censoring the Bible so as to remove any "offensive" references to homosexuality. I can certainly foresee the sexual orientation discrimination "religious exemptions" (ie. that churches are not compelled to employ gay ministers, that Christian schools do not have to employ gay teachers, and so on) being removed. Each of these developments would significantly erode religious freedom and freedom of speech in Australia.

You might think these scenarios are a little far-fetched or fanciful. I don't agree. I believe they are a fairly uncontroversial aspect of what will be the inevitable long-term outcome of same-sex marriage on society. As outlined above, same-sex marriage confers with it far more than the right to a legal or technical title – it symbolises the complete normalisation of same-sex relationships. There is no room in a post-same-sex marriage world for dissenting voices. Perhaps at first there will be talk of "compromise" and "conscientious exemptions" – but in the end, religious adherents and religious institutions will be forced to submit to the "accepted view". Make no mistake about it: same-sex marriage sets up a battle between religious freedom and the desire of homosexuals for unquestioning societal approval. Accordingly, this issue does not just involve homosexual "rights" – it involves religious "rights" as well. Crucially, the failure to enact same-sex marriage legislation will not diminish the rights that homosexuals currently enjoy in any way; whereas the enactment of same-sex marriage legislation will inevitably diminish the rights that religious adherents and religious institutions currently possess. Which of the two are you more comfortable with?

[8] See, eg. Brian Camenker, "What Same-Sex Marriage Has Done to Massachusetts: It's Far Worse than Most People Realise" (20 October 2008), available at <http://www.massresistance.org/docs/marriage/effects_of_ssm.html> (accessed 1 April 2012).

In summary, I submit on the basis of the above that the Bill is both unconstitutional and morally inappropriate. I thank you again for inviting submissions in relation to the Bill, and I look forward to reading your report.

Yours sincerely