AMBROSE CENTRE FOR RELIGIOUS LIBERTY

SUBMISSION

TO

SENATE LEGAL AND CONSTITITIONAL COMMITTEE

INQUIRY INTO

MARRIAGE EQUALITY AMENDMENT BILL 2010

The Ambrose Centre for Religious Liberty (Ambrose Centre) is most grateful for the opportunity to make this submission.

The Ambrose Centre is a human rights oriented organisation; it is not and does not pretend to be a religious organisation. It is incorporated as a 'Not for Profit" organisation and engages in activities of educating, promoting and bringing awareness to issue affecting the fundamental human right of religious liberty.

The Ambrose Centre is vitally interested in potential cultural changing issues and sees that the Marriage Equality Amendment Bill 2010 (the Bill) comes into this area of interest.

The Ambrose Centre has a Board of Advisors drawn from the legal fraternity, former politicians from both sides of the major political parties and individuals from all the main religious communities.

INTRODUCTION

The Bill seeks to amend the Marriage Act 1961 (Cth) (the Act) so that reference to persons eligible to be married would include persons of the same sex. In short, should the Bill progress to legislation then we would have lawful same-sex marriage in Australia. Secondly, the Act would also be amended to recognise in Australia same-sex marriages performed overseas. There are other consequential changes such as removing identity of a spouse with the word partner.

The Bill claims to create the opportunity for marriage equality for people regardless of their sex, sexual orientation or gender identity.

The general arguments which constantly are heard in support of same-sex marriage are three in number:

1. Denial of marriage rights for same-sex couples is a breach of their human rights;

2. It is discrimination against the homosexual community for the law to allow heterosexual couples to marry but not same-sex couples;

3. Same-sex couples are treated as if they are second class citizens by refusing them the same right to marriage as enjoyed by heterosexual couples.

Admittedly, the Bill is wider than same-sex as it refers to two people irrespective of their sexual identity or sexual inclination.

Should the bill become law in its present form or close to its form, then the cultural effects will be far reaching and beyond what the immediate intention of the Bill may intend.

THE LAW

1. The Marriage Act defines marriage to "*mean the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"*[1].

2. It is widely accepted that this definition of marriage is taken from the common law as stated by Lord Penzance in the English case known as *Hyde v Hyde and Woodmansee*[2]. Ironically, this case was to consider an application by the husband, Mr Hyde, for a divorce which subsequently was denied.

3. The right of the Federal Parliament to legislate on marriage is based on a grant of constitutional power found at Section 51 (xxi) which states:

[1] *Marriage Act 1961*, s.5
[2] [L.R.] I P. & D. 130

"*The Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to : Marriage."*

4. The Constitution does not define Marriage but most legal commentators are of the view that, unless a referendum is held to decide otherwise, the word *marriage* in the Constitution is restricted to opposite sex or would permit same-sex will be decided ultimately by the High Court of Australia.

5. To date, the High Court has not attempted any definition. However, High Court judges have periodically made obiter comments with respect to the meaning of marriage and the Constitutional meaning.

6. One State[3] and one Territory[4] have toyed with the idea of exploring same-sex marriages within their jurisdiction but nothing has emerged.

7. It appears to be common ground that the question of marriage is a Commonwealth matter and only the Federal Parliament can legislate with respect to marriage.

8. Should the Federal Parliament legislate for same-sex marriage, then the matter will inevitably move to the High Court to test the Constitutional limitation on the definition of marriage.

HUMAN RIGHTS

9. The proposer of the bill, Senator Sarah Hanson-Young has repeatedly claimed that denial of marriage to same-sex couples is a breach of their fundamental human rights.

10. Other proponents of same-sex marriages, activists and publications often refer to same-sex marriage as a human right.

11. No evidence is ever produced to ground this assertion or belief that a human right, let alone a fundamental human right, is somehow violated.

[3] Tasmania
[4] ACT

12. The international instrument which most countries accept as the human rights authority is the International Covenant on Civil and Political Rights. Article 23 deals with the right to marry. It states:

Article 23:

1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

2. *The right of men and women of marriageable age to marry and to found a family shall be recognised.*

3. *No marriage shall be entered into without the free and full consent of the intending spouses.*

4. *State parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

13. Item 2 of Article 23 is often referred to as being open to the meaning of any two people may marry. Such a view fails to connect the second limb of that item 2 which links marriage with founding a family.

14. Item 2 also is unique as it the only item that specifically refers to 'men' and 'women' and not, like all other Articles in the Covenant which refer to *every person* or *everyone* or *every human being*[5].

15. The reference to 'men and women' and to 'found a family' has an inescapable meaning that marriage is intended only for men and women marrying each other[6].

16. Some States in the United States allow same-sex marriages, all of which have resulted from Court decisions. However, the United States Supreme Court has yet to hear a case specifically on whether same-sex marriage is a Constitutional Right.

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[5] *Josln et al v New Zealand* (902/99) see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* 2nd Ed; Oxford University Press 2055 at p 608 [20,29] 8.2.

[6] Ibid.

17. Two things should be borne in mind by the Senate Committee: Firstly, marriage laws in the United States are State matters and secondly, the Constitutional question which the US Federal District appeal Courts consider on same-sex marriage rights comes within the 14th Amendment.

18. The 14th Amendment concerns itself with Protection of Equal Rights and Due Process. In essence, it is an anti-discrimination based law.

19. Any claim that human rights are in play due to Court decisions in favour of same-sex marriage in the United States is fallacious. In fact, in dismissing an application for same-sex marriage rights[7] in *Baker v Nelson (1972)*, the Supreme Court held that laws prohibiting same-sex marriage is not violative of the Equal Protection clause or of the Due Process clause of the 14th Amendment[8].

20. The claim to a human right for same-sex marriage was again denied in the case before the European Court of Human Rights known as: *Schalk and Kopf v Austria*[9].

21. This case was decided 24 June 2010 and involved an application by a same-sex couple in a registered Civil Union relationship in Austria. Their application was that Austrian laws denied their human right because they did not enjoy the full benefits that are visited on heterosexually married couples.

22. The matter before the Court involved the application of Article 12 of the *European Convention on Human Rights* and also the *Charter of Fundamental Rights of the European Union*, Austria being a member of the European Union.

23. Article 12 reads:

> "*Men and Women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."*

[7] The Supreme Court did not hear substantive arguments on same-se marriage but only is there was a Federal case of substance.

[8] Margaret Datiles- *Headline Bistro* – August 30,

[9] Application no. 30141/04

24. After full and comprehensive examination of the Article, the Court unanimously held that there was no violation of Article 12. In very clear terms the Court held there was no human right for same-sex marriage[10].

25. *Schalk and Kopf* was reaffirmed by the European Court of Human Right by a chamber decision in *Gas and Dubois v France*[11] delivered on 15 March 2012.

26. Same-sex marriage activists' reliance on human rights in support of their cause are either blissfully unaware of developments in Human Rights Laws, are fanciful in their claim or misrepresenting the truth.

DISCRIMINATION

27. The human rights committee attached to the International Covenant on Civil and Political Rights believes that the term 'discrimination' as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedom*[12].

28. Australian discrimination law vary slightly from jurisdiction to jurisdiction but all jurisdictions give protection to most if not all the attributes mentioned above.

29. No jurisdiction in Australia recognises same-sex marriage as an attribute to be protected.

30. To consider whether the denial of marriage to same-sex couples is an exercise in discrimination requires an examination of *what is marriage*.

31. In the Australian context, to establish whether discrimination is exercised against an attribute, it generally requires a comparison with another person not having the same attribute and assessing if the person with the attribute is

[10] Reasons of the Court

[11] Application no. 25951/07

[12] Sarah Joseph et at at p 680/681 [23.04], n 5

treated differently to their detriment. For instance, is a woman treated differently to a man in similar circumstances.

32. It is common knowledge and an established fact that the Federal Government made 84 amendments to Commonwealth Legislation in 2009. In doing so, it removed all and any differences applying between opposite sex marriages and same-sex couples in established relationships.

33. The Federal Government did not amend the Marriage Act 1961 as it has consistently held that marriage is between one man and one woman.

34. Any suggestion that same-sex couples are in any way treated differently to opposite sex couples inside or outside of marriage, other than the right to marry, is unsustainable.

35. The notion of discrimination in common law countries has been influenced and developed from cases before the Supreme Court of the United States[13].

36. These cases which influenced the development of discrimination law were largely based on birth characteristics of race, colour and sex (male or female).

37. One case, in particular, which is relevant to the same-sex marriage debate is that of *Loving et ux v Virginia*[14] argued before the Supreme Court of the United States and decided in 1967.

38. *Loving* is the miscegenation case that same-sex marriage activists in Australia often claim a parallel with. The same-sex marriage activists point to *Loving* as the seminal case which changed marriage.

39. However, *Loving* was not about marriage but about race and colour. The Supreme Court did not attempt to redefine marriage but clearly asserted that marriage was between a man and a woman. Marriage within racial lines was always between a man and a woman. The court in *Loving* removed the bar which prevented interracial marriages in some States.

40. Chief Justice Warren said in *Loving*:

[13] Neil Reed, Katherine Lindsay, Simon Rice: Australian anti-discrimination law, Text cases and Material. Federation Press 2008 at p 68 ch.4
[14] 388 U.S. 1. Decided June 12, 1967

Marriage is one of the "basic civil rights of man, fundamental to our very existence and survival."

41. The Chief Justice comments identified the procreative quality of marriage as fundamental to existence and survival. He did not assert a right to marriage of any two people.

42. The Attempt by same-sex marriage activists to equate their cause with race discrimination is mendacious.

43. Homosexuality does not go to birth. There is no authorative medical or psychiatric report or pronouncement which states that homosexuality is a birth characteristic.

44. Discrimination laws developed around characteristics of birth; race, colour, gender, disability and other characteristics which form the person. Same-sex attraction is not one of these.

45. The former United States Secretary of State Colin Powell, himself a black person said[15]:

"*Skin colour is a benign, non-behaviour characteristic. Sexual orientation is perhaps the most profound of human behaviour characteristics. Comparison of the two is a convenient but invalid argument."*

46. If there was to be a comparison between opposite sex marriage and same-sex marriage, what would be the difference and would that difference constitutes a profound reason why the two are not the same.

47. It should be obvious to anybody that homosexual acts and opposite sex act are clearly different: Homosexual acts are not natural, defy the biological order and not based on normal definitions of the sexes. Opposite sex act is in accordance with nature, is procreate, in harmony with biological design, accord to nature and is complementary.

48. Suffice to say the difference is profound.

[15] Op.cit. Margaret Datiles n 7

49. Professor Gerard Bradley of Notre Dame University, Indiana, says[16]:

> *"Homosexual want their relationships legally, that is, publically, recognised as marriage because it matters."* He goes on to say: *"anyone can see that two (or more) persons of the same-sex can set up a household, and even acquire children whose diapers they change. But persons of the same-sex can never form a mated pair. Be the originators of human reproduction, engage in sexual act open to new life, have children who are, literally, the embodiment of their – the couple's - two in one flesh union. Children can never be the "issue" (the classic legal term) of any same-sex act."*

50. The politics of same-sex marriage is not merely legal or ideological but largely philosophical. Referring to the campaign for same-sex marriage, Frank Furedi wrote[17]:

> "*From a sociological perspective, the ascendancy of the campaign for gay marriage provides a fascinating story about the dynamics of the cultural conflicts that prevails in Western Society. During the past decade the issue of gay marriage has been transformed into a cultural weapon that explicitly challenges prevailing norms through condemning those who oppose it. ...it does not simply represent a claim for a right but a demand for the institutionalisation of new moral and cultural values".*

51. Support for same-sex marriage is not universal in the homosexual community as many shun societal views of what marriage requires, that is, amongst others fidelity and that it be monogamous.

52. Nancy D Polikoff , Professor of Law at Washington College of Law, The American University, was frank and open with her views on same-sex marriage she wrote[18]:

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[16] National Review Online – Flashback, July 12, 2004

[17] The Australian, "Where Gay Matrimony Meets Elite Sanctimony" 25-26 June 2011

[18] Virginia Law Review, Vol. 79 No 7, Symposium on Sexual Orientation and the Law. (Oct. 1993), pp 1535-1550 at p 1535

"... my lesbian identity was intertwined with a radical feminist perspective...I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.

The only argument that has ever tempted me to support efforts to obtain lesbian and gay marriage is the contention that marriages between two men or two women would inherently transform the institution of marriage for all people."

53. The claim that a denial of marriage to same-sex marriage is discriminatory is illusory. It is a fiction intended to promote the view (falsely) that homosexuality is the same as heterosexuality. Clearly, there are profound differences.

THE ESSENCE OF MARRIAGE

54. Arguments against same-sex marriage are varied; some rely on religious authority others see marriage as collapsing should same-sex marriage succeed, others again can see no intrinsic merit serving the common good emerging from same-sex marriage.

55. It is our submission that marriage is an indispensible institution that is instrumental to the regeneration of society. Without such purpose, marriage, should it be changed to allow same-sex couples to marry, would assume a different dimension. The inherent underlining societal expectation, responsibility and conjugal relationship that is assumed with marriage would be removed. Marriage would be something else, the purpose would be immediate not futuristic, individualistic with no rules other than love and choice defining the new marriage.

56. The new marriage order would be to serve the needs of the individuals in the marriage, not the common good of the society. Obviously, those who wish to follow the old rules would not be prevented from doing so, but the new definition would make no such demands.

57. Paul Kelly, writing in the Australian, wrote[19]:

"*Greens Adam Bandt says*: "*Love has no boundaries; Love has no limits."*

It erects a libertarian construct of marriage and, once opposite sex exclusivity is terminated, it opens the way for a variety of postmodern and cross-cultural constructs where marriage can encompass a range of sex options and people. That's what "love without boundaries" means

58. On the other hand, judges and courts have a more benign and putative position on marriage.

59. In *Egan v Canada*[20], the first Supreme Court of Canada case to deal with whether a same-sex relationship should be considered a spousal relationship, Justice La Forest said:

> *"Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate...In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage*[21].

60. Justice La Forest says it right. There is an essential element to marriage which cannot be duplicated by same-sex couples. Allowing same-sex couples to marry would make a nonsense of marriage to the point it would be meaningless.

61. It is agreed, in this submission, that heterosexuals have done damage to the institution of marriage. There is a high divorce rate, many children are born outside of marriage, there are many single parent (mainly women) households

[19] The Australian November 30, 2011
[20] (1995) 124 D.L. R (4th) 609
[21] Ibid at p 625

and infidelity is not uncommon. This behaviour visits no merit on the heterosexual community but it does not change the importance of marriage nor its definition. Same-sex marriage would do both, if legalised.

IN-CONCLUSION

62. Should the arguments advanced by supporters of and activists for same-sex marriage, based on equality and discrimination, succeed, then new challenges lay ahead in the foreseeable future.

63. In Holland, where same-sex marriage is legal, a heterosexual married couple petitioned the government to further amend the marriage law to allow three people to marry.

64. The petition followed from the woman in the marriage forming an open lesbian relationship but wishing to remain in the heterosexual marriage with her husband. A condition to which the husband agreed and at which the other woman was invited to join the household[22].

65. The threesome relationship endured and from all accounts was stable and loving with consensual sex between the individuals at will without jealousy.

66. The application was refused but it is open as to why bi-sexual relationships would have less right than homosexual relationships if marriage was no longer restricted to heterosexuals who engaged in procreative capacity sex and enjoying conjugal acts.

67. A second matter is that of the *Burden* sisters.

68. This matter was argued before the Grand Chamber of the European Court of Human Rights[23]. It involved an action by the *Burden* sisters against the Civil Partnership Act 2004 enacted by England. The Civil Partnership Act enabled same-sex couples in a stable relationship to register their relationship and receive identical benefits as are prescribed to heterosexual married couples

[22] Weekly Standard.com vol.11 No 15 December 26, 2005
[23] Case of Burden v The United Kingdom Application no. 13378/05

69. The Burdens said that they were in a committed, loving and stable, but not sexual, relationship as sisters, living under the same roof.

70. The Civil Partnership Act would not allow them to register their relationship of dependency, comfort, love and commitment to one another. By this denial they could not enjoy taxation and welfare benefits that registered Civil Partnerships received. They said they were being discriminated against and that their human rights violated as the law regarded their relationship to be that of second class citizens.

71. Their application failed but the point is clear. If marriage is changed to any two people, where is the boundary drawn?

72. It is submitted that support for same-sex marriage is not as widespread as the activists would have us believe.

73. In a survey poll commissioned by the Ambrose Centre[24] and released in November 2011, support for changing the Marriage Act was 49 percent in favour and 40 percent against. However, changing the Marriage Act was regarded as the least important matter when compared to other issues confronting the Country.

74. The Poll which was conducted by the Sexton Group showed that only 14 per cent were strongly in favour of changing the Marriage Act while 18 per cent were strongly opposed.

75. Commenting on the Poll, Paul Kelly of The Australian newspaper observed:

> *"For instance, 69 per cent agreed that a man-woman marriage should be upheld for its traditional meaning and as an important social institution"*[25].
>
> Kelly also described the poll as a sophisticated survey[26].

[24] The full results of the Poll can be accessed on the Ambrose Centre website: www.ambrosecentre.org.au.
[25] The Australian November 30, 2011
[26] Ibid

76. It is our submission that the Marriage Act 1961 should not be amended and the Marriage Equality Amendment Bill 2010 should be rejected.

Submitted by:

Ambrose Centre For Religious Liberty
Rocco Mimmo
Founder & Chairman

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