Victorian Council for Civil Liberties Inc
Reg No : A0026497L

The Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100, Parliament House, Canberra ACT 2600

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2 April 2012

Dear Secretary,

Inquiry into the Marriage Equality Amendment Bill 2010

On behalf of Liberty Victoria—The Victorian Council for Civil Liberties Inc.—I make the following submission to the committee's inquiry into the Marriage Equality Amendment Bill 2010.

The submission strongly urges the Committee to recommend to the Senate that Senator Hanson-Young's bill, with minor modifications, be passed as soon as practicable.

Yours faithfully,

Jamie Gardiner
Vice-President

Liberty Victoria submission

to the

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

Introduction

1. Liberty Victoria thanks the Committee for the opportunity to make this submission on the *Marriage Equality Amendment Bill* 2010

2. The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to Australia's first civil liberties body, established in Melbourne in 1936.

3. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the human rights and freedoms recognised by international law and with the human rights obligations freely undertaken by Australia in ratifying the international human rights treaties. Liberty's contribution is well known to Senate and House committees, and we have campaigned extensively in the past on issues concerning human rights and freedoms, equality, democratic processes, government accountability, transparency in decision-making and open government.

Our support for equality

4. Liberty commends Senator Hanson-Young on her bill, whose goal of removing discrimination against same-sex couples from the *Marriage Act* 1961 is one we wholeheartedly endorse.

5. We urge the Committee to recommend to the Senate that the Bill (subject to some comments below, including reconciliation with the House Bills) be debated and passed as soon as practicable.

Developments since 2009

6. Liberty draws the Committee's attention to its submission (m43) to the 2009 inquiry on Senator Hanson-Young's earlier bill for marriage equality, and reiterates the arguments made therein.

7. Senator Hanson-Young is to be congratulated for several changes from the 2009 bill in the drafting of the current bill. Liberty commends the usage of "sexual orientation" (instead of "sexuality") in the long title, objects clause and definition of marriage. The restoration of the words "to the exclusion of all others" sensibly avoids introducing extraneous and separate issues to an already disputatious area. Items 2 and 4 of the schedule (words to be said by celebrant) helpfully omit the previous bill's lengthier paragraph and substitute a simple reference to "partner" additional to the Act's current wording.

8. It was clear from the Committee's report of its Inquiry into the 2009 Bill that the arguments in favour of equal marriage were greatly superior to those against. Sadly the report's majority conclusion—Recommendation 3—against the passage of the Bill was out of kilter with its reasoning. This time, however, Liberty urges the Committee to find in favour of the enactment of marriage equality, as the arguments in favour are even stronger now, and are bolstered by the decision of the ALP National Conference in December 2011 to amend the Platform to support marriage equality.

9. Liberty noted with gratitude the 2009 Report's Recommendation 2, concerning Certificates of non-impediment to marriage, and the subsequent decision of the 2011 ALP National Conference to the same effect. Liberty is very pleased that the Government has now changed its policy, and that these certificates are now, and since 1 February 2012, issued on a non-discriminatory basis, as the Committee's Report recommended.

House Bills

10. As the Committee is aware, there are two House Bills on the same subject. Liberty strongly urges the Committee, and Senator Hanson-Young, to work with Mr Jones and Mr Bandt to achieve a single text, and to recommend to the Parliament that text's passage into law, without delay, as a matter of urgent and fundamental importance.

Worldwide trend to marriage equality[1]

11. Australia was once a leader in the protection of human rights, and in the valuing of a fair go for all, which is at the very foundation of human rights. It is now over ten years since the prejudices preventing same sex couples from marrying began to crumble around the world.

12. The Netherlands was the first nation to open up marriage to same-sex couples: in 2001. Belgium followed, then Canada, South Africa, Spain, Norway, Sweden, Portugal, Iceland and, in 2010, Argentina. Ten countries in ten years.

13. Indeed when the Supreme Court of Mexico considered the constitutionality of the marriage equality law enacted in the Federal District (Mexico City) it examined the international legislation and legal cases, and concluded that there was "a world-wide trend" to recognizing marriages between persons of the same sex. It concluded that the Federal District's equal marriage law was constitutional, and ruled that marriages conducted under it were valid throughout Mexico, making that nation arguably the eleventh country where same-sex couples can marry (if they live in or can afford to travel to the capital).

14. Brazil is the twelfth nation where same-sex couples can marry, it appears, as the result of court cases in recent months, although the process for same sex couples is not yet as straightforward in most of Brazil's states as that for mixed sex marriages.

15. Denmark's prime minister (incidentally their first female prime minister) introduced a law for marriage equality into parliament in March; it is to come into force in June 2012, making Denmark the eleventh nation with full, nation-wide marriage equality.

16. As the Committee will be well aware, several states of the USA have enacted equal marriage laws too.

17. The petulant assertion by advocates of discrimination that marriage has only one meaning and cannot embrace equality is exploded once and for all by the laws and practice of these nations and states.

18. The "world-wide trend" to marriage equality is one that is consistent with both fundamental principle and Australia's international obligations to end discrimination. It is a trend Australia should join without further delay.

Confusion about religion

19. As Liberty pointed out in its 2009 submission, marriage in Australian law is a civil union, not a religious sacrament. More than two-thirds of marriages are conducted by civil celebrants, the proportion rising every year: 69.2% in 2010 (latest ABS figures[2]).

20. The continued, unconscionable meddling by certain religious bodies in the civil institution of marriage is hard to understand; that anyone heeds it is impossible to understand.

21. The *Marriage Act* 1961 does not regulate religious marriage rites; nor should it. The *Marriage Act* 1961 permits ministers of religion to officiate at a legal civil marriage in the course of conducting a religious marriage rite, and expressly exempts such celebrants from any obligation to conduct a marriage: section 47. A religious celebrant, that is, cannot be required to conduct a marriage inconsistent with the religious beliefs or practices of that celebrant or his or her religious body.

22. Some religious bodies are perfectly happy to conduct marriages without the discrimination that others insist upon. (See, for example, the submission m22 of the Canberra Quakers to the 2009 Inquiry, or the statement of 20 religious leaders referred to in *The Age*[3] today, or the submission to the present Inquiry of the dean of St John's Anglican Cathedral in Brisbane the Very Reverend Dr Peter Catt.)

23. The attempt by fundamentalist, religious bodies to impose their doctrines on persons of other or no religion, by lobbying for the *Marriage Act* discrimination against same-sex couples to continue, is a blatant breach of the religious freedoms such bodies trumpet when it is in their interest. Their meddling in civil law must be resisted.

24. The clamor of certain religious bodies against marriage equality is so loud as to make it appear that the Howard amendment to the *Marriage Act* in 2004 is in their view the imposition of a religious observance, namely the conversion of their discriminatory religious doctrines on marriage into law, and as such in violation of section 116

(Commonwealth not to legislate in respect of religion) of the Constitution.

25. As Liberty suggested in 2009, and now more firmly urges, the Committee should recommend that the French solution be adopted in Australia: religious celebrants should have no role in legal marriage. The statutory authorization of ministers of religion as marriage celebrants should cease, and subdivision A of Division 1 of Part IV of the *Marriage Act* 1961 should be repealed.

26. While the current unsatisfactory delegation to religious celebrants of the power to officiate at civil marriages continues, however, it is clear that respect for freedom of religious belief and expression requires that religious celebrants not be required to conduct religious ceremonies inconsistent with their beliefs, even if those beliefs are discriminatory. Section 47 of the *Marriage Act* 1961 ensures precisely this.

27. Liberty endorses the silence of Senator Hanson-Young's Bill on this point, and does not endorse adding, as the House Bills seek to do, a special section to emphasize, in relation to same-sex couples, what s.47 already does in relation to other marriages that religious bodies currently refuse to perform, such as those involving a divorced person, or a non-member of the faith in question.

Objects and heads of power

28. Various commentators have suggested that the Commonwealth has no constitutional power to remove the present discriminatory provisions of the *Marriage Act*. Liberty Victoria rejects this view and urges the Committee to give it short shrift.

29. The Parliament clearly was of the view in 2004 that the marriage power did extend to non-discriminatory marriage, for otherwise the insertion of s.88EA would not have been possible.

30. While it seems obvious that the concurrent marriage power in section 51 of the *Constitution* cannot be locked forever into the very different understanding of marriage in nineteenth century England, it is also clear that under the external affairs power the Commonwealth can legislate to better implement the equality guarantee in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and other relevant international instruments to which Australia is a party. Either way there is power to implement marriage equality.

31. Furthermore, as noted above, the current definition is, in the eyes of some religious bodies at least, the imposition of a religious doctrine itself, and as such is unconstitutional. Whether or not it is repugnant to the *Constitution*, however, it is certainly repugnant to the guarantee of equality in and under law in the ICCPR, as well as to the Australian ideal of the fair go.

32. The Objects clause of the Bill should make express reference to the human right to equality and Australia's obligations under the ICCPR, in particular Article 26, to whose better implementation the Bill is directed.

Consequential amendments

33. Liberty Victoria draws the Committee's attention to the need to make consequential amendments to the *Family Law Act*, among others, when marriage equality is enacted, and urges that an item be added to the Schedule, such as is included in Mr Bandt's Bill, to facilitate this.

34. In addition to matters that could be dealt with by such a mechanism the Committee is urged to consider whether any provisions need to deal with transitional issues affecting people whose valid marriages have hitherto been refused recognition under s.88EA.

Drafting issues

35. In addition to matters mentioned above, Liberty has concerns about the Bill's formulation of the definition of marriage as the union of two people "regardless of their sex, sexual orientation or gender identity." While fervently agreeing with the sentiment it expresses, in Liberty's view the statement of non-discrimination would be better located as a separate subsection of the definitions section, leaving the marriage definition simple, and placing the non-discrimination phrase at a more general level.

36. This could be achieved by adding to Section 5 a new sub-section 5(4): "In this section a reference to a person or to people must be interpreted to include a person or people regardless of their sex, sexual orientation or gender identity."

37. The marriage definition in s.5(1) would then read simply "***marriage*** means the union of two people, to the exclusion of all others, voluntarily entered into for life" and s.5(4) (as above) would ensure that it would continue to be interpreted without discrimination on the named grounds, and would also ensure such non-discriminatory interpretation of the Act as a whole.

Conclusion

38. Both respect for human rights and the necessary separation of church and state demand that the discriminatory provisions of the Marriage *Act* 1961 be removed and replaced by express recognition of the human right to equality. The *Marriage Equality Amendment Bill* 2010, subject to the remarks above, should be debated and passed.

Jamie Gardiner
Vice-President

[1] Jamie Gardiner, "Same-sex marriage: A world-wide trend?" (2010) *Law in Context* vol 28 nº 1 pp92–107

[2] Australian Bureau of Statistics, 30 November 2011, *3310.0 - Marriages and Divorces, Australia, 2010* "Marriage celebrants"

[3] "Clerics support gays in letter" *The Age* 2 April 2012 (viewed 2 April 2012 at http://www.theage.com.au/national/clerics-support-gays-in-letter-20120401-1w6kn.html#ixzz1qno5EFlX)