Hawkesbury Nepean Community Legal Centre Inc

29 March 2012

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

Dear Committee,

Inquiry into the *Marriage Equality Amendment Bill 2010*

Hawkesbury Nepean Community Legal Centre (HNCLC) appreciates the opportunity to provide a submission to the Inquiry into the *Marriage Equality Amendment Bill 2010* which seeks to remove all discriminatory references currently contained in the *Marriage Act 1961* to allow all people, regardless of sex, sexuality and gender identity, the opportunity to marry.

Hawkesbury Nepean Community Legal Centre

HNCLC, located in Windsor NSW, is a non-government community-based legal service providing free legal information, advice and casework to people living in the Hawkesbury, Nepean and Hills areas and is one of forty community legal centres (CLCs) in NSW.

HNCLC works for the public interest, particularly for disadvantaged and marginalised people and communities. We promote human rights, social justice, and a better environment by advocating for access to justice and equitable laws and legal systems through the provision of legal services including strategic casework, community legal education, community development and law reform campaigns.

CLCs are actively involved in human rights. CLCs:

- have a human rights focus;
- work within human rights frameworks;
- advocate for human rights on behalf of their clients and communities of interest;
- inform, advise and represent individuals and groups where human rights are at issue;
- educate individuals, groups and communities of interest about human rights and related legal and societal processes; and
- undertake law reform activities to improve human rights protections and processes.

Relationship recognition

In 2007, the Australian Human Rights Commission produced the report *Same Sex: Same Entitlements*, which examined financial and work related discrimination against same sex couples and their children.[1] In 2008 and 2009 and following on from this report, changes were made to 108 Commonwealth laws identified as providing differential treatment between same-sex and opposite-sex couples. However, the *Marriage Act 1961 (Cth) was* excluded from these changes, having been amended in 2004 under the Howard Government to define marriage as the union of a man and a woman and to preclude the recognition of overseas same-sex marriages.

HNCLC strongly supports the removal of all discrimination against lesbians, gay men and gender diverse people and advocates for equality of laws for all people, regardless of their sexual orientation and gender identity, and equality of laws for all relationships, whether they be opposite-sex or same-sex relationships.

Accordingly, HNCLC endorses the *Marriage Equality Amendment Bill 2010* which will amend the *Marriage Act 1961* to remove existing discrimination against same-sex couples.

Consequences of failing to amend the *Marriage Act 1961*

A failure to amend the *Marriage Act 1961* to legally recognise marriage between same-sex couples leads to a number of consequences, as outlined below.

1. Contravention of Australia's national and international human rights obligations

Australia has ratified a number of international human rights treaties and while such treaties do not form part of Australia's domestic laws, ratification indicates a commitment by Australia to the recognition of the rights contained in each of the treaties.

In 1980, Australia ratified the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR expressly provides for equality before the law and the right to non-discrimination. Importantly, Article 2(2) of the ICCPR requires Australia to take all necessary legislative and other measures to give effect to the rights in the Convention.

Article 23 of the ICCPR states that men and women of marriageable age have a right to marry as long as the intending spouses give their free and full consent to the marriage. Article 23 also requires Parties to the Covenant to take the appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage.

Article 26 of the ICCPR states that all persons are equal before the law and are entitled to the equal protection of the law without any discrimination on any ground including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. "Sex" is taken to include sexual orientation.[2]

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[1] Available at http://www.humanrights.gov.au/human_rights/samesex/index.html
[2] Toonen v Australia (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7]

In 1975, Australia ratified the *International Covenant on Economic Social and Cultural Rights* (ICESCR). Article 2(2) of ICESCR creates an obligation by all Parties to the Covenant to guarantee that the rights enshrined in ICESCR, that is, economic, social and cultural rights, be exercised without discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 states that Parties to the Covenant will ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set out in ICESCR.

Article 10 refers to the family unit as the natural and fundamental group unit of society. It also refers to marriage as between those who give their free consent.

Under the current terms of the *Marriage Act 1961*, Australia is discriminating against same-sex couples on the basis of sexual orientation and gender identity by failing to afford all persons equal protection before the law. Australia is also failing in its obligations under the Conventions to take all legislative and other measures required to ensure that all rights contained in the ICCPR and the ICESCR are guaranteed.

Accordingly, HNCLC submits that the failure to legally recognise same-sex marriage amounts to a contravention of national and international human rights standards.

2. Leaves Australia lagging behind in the international context

Same-sex couples can legally marry in many countries, including Canada, the Netherlands, Norway, Spain, Sweden, Argentina and South Africa.

While HNCLC commends the recent decision to issue eligible same-sex couples with Certificates of No Impediment to marry in these jurisdictions, those marriages are still not legally recognised in Australia.

Couples who are legally married in overseas jurisdictions, should have their marriages recognised in Australia.

A refusal to amend the *Marriage Act 1961* leaves Australia lagging in the international context.

3. Incompatibility with the overwhelming support amongst the Australian population for legal recognition of same-sex marriages

Marriage equality has an overwhelming and broad level of community support. Consistent polling indicates that over 60 percent of Australians support marriage equality.[3]

A refusal to amend the *Marriage Act 1961* demonstrates that the Australian Government is failing to keep in step with the majority view of Australians.

[3] Galaxy Poll commissioned by Australian Marriage Equality and PFLAG in 2010 found 62% supported same-sex marriage; Newspoll in November 2010 found 65% (of 148,000) supported same-sex marriage; Westpoll in December 2010 found 61% of people in Western Australia supported same-sex marriage.

4. Perpetuates the legal and social inequities currently experienced by lesbian, gay men and gender diverse people in Australia

The right to marry is one of the rights enjoyed in a liberal democratic society. The current discrimination in the *Marriage Act 1961* carries a social message that same-sex relationships are inferior and not deserving of the same respect and recognition as relationships between consenting heterosexual adults. Such a message fuels discrimination, harassment and victimisation against lesbians, gay men and gender diverse people and their relationships.

The *Marriage Act 1961* is the last remaining piece of Commonwealth legislation that discriminates against people based on their same-sex relationship. Legislating in favour of same-sex marriage will do so much more than give equal and non-discriminatory legal recognition; it will send a clear message that discrimination on any ground is not acceptable and that all people deserve equality and respect. This message will translate to social and attitudinal change.

Marriage is a civil institution

Marriage is a civil institution governed by secular laws.

Contrary to much of the commentary and hyperbole from religious institutions, marriage is not an immutable religious institution. While marriage takes various forms across many different cultures and has assorted religious histories attached to it, marriages performed by the State are civil, not religious, in nature.

Marriage equality will not interfere with the right of religious individuals or organisations to refuse to perform ceremonies inconsistent with their beliefs and is not to the detriment of or restriction of any other human right.

It is imperative that religious interests are not privileged over the right of all citizens to non-discrimination and to be treated equally under the law.

Marriage is an ever-evolving institution

The rules governing marriage have evolved significantly over the years. For example, wives are no longer treated as the property of their husbands, we now prohibit rape in marriage, we allow interracial couples to marry and we allow and recognise divorce.

There is no valid reason that in 2012, marriage rights should not be extended to allow all people, regardless of sex, sexuality and gender identity, the opportunity to marry.

Civil unions and relationship registers are not substitutes for full marriage equality

In the absence of marriage equality, civil unions and relationship registers are not appropriate or acceptable substitutes for marriage. Civil unions or relationship register schemes under such conditions simply produce a tiered relationship structure that privileges heterosexual relationships while undermining same-sex

relationship recognition. Such options are only acceptable where there is full marriage equality.

Rights for married couples are privileged over those for unmarried couples

While same-sex couples can claim de facto status as a means of accessing rights and entitlements, for some couples it may be difficult to prove de facto status.

Further, despite the appearance of substantive legislative equality in Australia for all couples, married or unmarried, opposite-sex and same-sex, there are still areas of the law where additional hurdles are applied to de facto relationships that do not apply to married relationships. For example, section 90SB of the *Family Law Act 1975*, requires de facto couples to satisfy certain criteria before the Court can make orders relating to property division whereas, immediately upon marriage, married couples can access the Court. Similarly, in most States, legislation governing succession and intestacy require couples who are not married to have been in a de facto relationship for at least two years before the surviving partner is recognised as the deceased person's partner.

A marriage certificate gives instant and guaranteed relationship recognition and consequently, automatic access to relationship entitlements.

Marriage is also much more widely recognised than de facto status and allows couples to have their relationship recognised with ease when they move or travel.

Denying same-sex couples a portable, nationally consistent and internationally recognised form of relationship recognition can significantly impede their ability to enjoy their legal rights.

Sex and gender diverse people

In 2009, the Australian Human Rights Commission produced the *Sex Files Report,* which examined the legal recognition of sex in documents and government records.[4]

The report establishes that under state and territory legislation a person who is married cannot apply to have their sex changed on their birth certificate even if that person meets all other criteria for change. This means that a married person will not be able to have a birth certificate that represents their true sex identity, unless they first cease to be married, such as by obtaining a divorce.[5]

The report also documented that while a married person is able to change the sex noted on their Medicare records or Centrelink records, they will consequently lose recognition of their status as a married person. This can affect not only the person who seeks to change the record of their sex but also that person's spouse. In some cases losing recognition of marital status will result in a financial detriment.[6]

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[4] Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (March 2009) available at http://www.hreoc.gov.au/genderdiversity/sex_files2009.html

[5] Ibid, 30.

[6] Ibid, 31.

In failing to recognise same-sex marriages, sex and gender diverse people are being forced to choose between their relationship and sex status.

In closing, HNCLC strongly supports the *Marriage Equality Amendment Bill 2010*. The Bill demonstrates a commitment to the provision of equal and non-differential treatment of all relationships by way of a definition of marriage as the 'union of two people' irrespective of sex, sexual orientation and gender identity.

Accordingly, we urge the Committee to ensure that the discrimination currently enshrined in the *Marriage Act 1961* is removed as a matter of priority so that Australia can take another step forward in ensuring that all citizens are treated equally regardless of their sexual orientation or gender identity.

Yours sincerely,
Hawkesbury Nepean Community Legal Centre

Philippa Davis
Principal Solicitor