



1 April 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600
Australia

(Submitted via email: legcon.sen@aph.gov.au)

To Whom It May Concern

I am writing to voice my opposition to the proposed change to the definition of marriage. I hope that the Senate will take the following views into account in its deliberations.

Much of the argument for the redefinition of marriage to include same-sex relationship is based on an appeal to 'equal rights', and any objection to this is dismissed as homophobia or bigotry. I hope to demonstrate that it is possible to have an in-principle objection to the proposed redefinition of marriage, while still recognising the rights of same-sex couples.

In short, my argument is that, should the government wish to recognise the legal rights of same-sex couples, the appropriate way to do this by the appropriate legal recognition of these relationships in their own right, and not by the redefinition of marriage.

As I understand the current situation, cohabiting same-sex couples are recognised as *de facto* couples and accorded the same rights as cohabiting opposite-sex couples in all States of Australia and under all Federal legislation. Furthermore, there are various forms of 'civil partnership' registers already in operation in New South Wales, ACT, Queensland, Tasmania and Victoria, and I would be in favour of a national civil partnership register. (It is for this reason, incidentally, that I find disingenuous the argument that same-sex marriage is necessary for "providing legal equality for same-sex partners and removing

discrimination against them".¹ There are very few areas at law where same-sex couples do not presently enjoy 'equal rights', and where there are differences, these are easily addressed by legislative amendment. The 'equal rights' rhetoric is not a compelling argument for a wholesale redefinition of the institution of marriage, especially if this redefinition will have significant knock-on implications for all marriages and all families.)

As a society, we faced a similar decision in the 1960's and 1970's, with the increasing number of couples living in what we now recognise as *de facto* relationships. At that time, one option would have been to redefine marriage, by removing the requirement that a couple commit to an exclusive and life-long partnership. This would have had the practical effect of including all *de facto* relationships within the definition of 'marriage' and thereby giving them all the same rights and protections at law. Instead, we pursued what I believe was a better option – legally recognising a new form of relationship and according equivalent rights at law.

I believe that the passage of time has demonstrated the wisdom of this decision. It extended the legal protections associated with marriage to a broadly analogous relationship, without thereby 'devaluing the currency' of marriage. The overwhelming majority of research demonstrates that the best outcomes for children are when they are raised by their biological parents who are in a committed long-term relationship. If, as a society, we had redefined marriage 40 years ago to remove the commitment to an exclusive and life-long partnership, it would have debased the coin of marriage for everyone, not just for *de facto* couples. This would have had disastrous effects on the stability of family life and on the children raised in this context.

I have raised the analogy of *de facto* relationships because it highlights the issue that is not being addressed in the current debate – the connection between marriage and children. Too much of the current debate has proceeded on the assumption that marriage is to be assessed solely in terms of a commitment between two people, without reference to the (historically) central role that marriage has played as the context for the raising of children.

This point is made cogently by Norrie, in an article entitled "Marriage is for Heterosexuals: May the Rest of Us Be Saved from It".² Norrie is a Professor of Law and an advocate of gay rights, who argues that same-sex couples should be seeking the recognition of their relationships on their own terms, rather than seeking to conform their relationships to the societal expectations of a 'marriage' relationship, which is based on rules and expectations shaped by the societal need to procreate.

¹ As per the standard submission generated at <http://www.australianmarriageequality.com/senate-inquiry-submission-form/>

² Norrie, Kenneth (2000) "Marriage is for Heterosexuals: May the Rest of Us Be Saved From It." *Children and Family Law Quarterly*, 12 (4). pp. 363-369.

He argues that our present legal understanding of marriage has arisen as a result of matters relating to progeny and property succession:

In opposite-sex relationships an extremely high premium is paid in most societies to sexual fidelity. The marriage laws of most legal systems are full of concepts designed to emphasise the importance of keeping sex within marriage: concepts such as adultery, child-illegitimacy, consummation, incest and impotency. And the reason is not hard to find. For the single most important difference between heterosexual activity and homosexual activity is that the former has the unique potential; and the latter has absolutely no potential, to create new human life. Child creation is of the utmost importance to society. But it should be remembered that these rules were not designed to ensure that children have a stable family upbringing - that is a very late twentieth century notion. More important was the need for safe and secure property devolution. A man needs to know that the children who inherit his property are actually his children. A child needs to know that his or her father is not spreading his seed, and the child's inheritance, abroad. The very terminology of the law tells us this quite clearly if we care to look: adultery is the adulteration of the male blood line (so gay sex and oral sex never were - and cannot be - adultery). 'Illegitimacy' referred not to the child, since that would be grammatically inept, but rather to the child's claim to inheritance. In other words, heterosexual activity outside the family relationship is economically very risky and property claims from outside the family disrupt both the family and, thereby, society itself. Child creation therefore needs to be controlled for the stability of society. This is the reason why sexual fidelity is so important for heterosexuals - because their sort of sex, as both common experience and literary tradition show, can seriously disrupt family finances and lines of succession (Norrie 2000:366-67).

Norrie's concern is that the extension of the definition of marriage to cover same-sex relationships will "inevitably come [with] all the (hetero)sexual baggage of consummation, incest, impotency and adultery. It would involve all the property baggage of loss of control of personal finances and all of the inhibiting baggage of requiring the State's permission to escape from the relationship" (Norrie 2000:368).

Anticipating the objection that it is discriminatory to have different approaches for different categories of relationships, Norrie responds:

Sex discrimination law has long recognised that equality is not necessarily achieved by treating different people identically. So too, relationship equality is unlikely to be achieved by treating different types of relationship identically, for that runs the risk of imposing inappropriate rules on some relationships (Norrie 2000:367).

Norrie's concerns are focussed on the impact on same-sex couples if they are forced to conform to heterosexual (i.e., family-driven) sexual and property norms arising from a conception of the marriage relationship shaped by the societal need to procreate. My primary concern is the flip-side of this – if we change the definition of marriage, the basis

of these family-driven norms will be eroded over time, because we will have broken the nexus between marriage and children. We will undermine the societal consensus that 'marriage' is the best context for the procreation and raising of children, which will have disastrous effects on generations of children to come.

I submit that, rather than change the definition of marriage in way that will have a consequence for all married couples, we should recognise long term and committed same-sex relationships as another relationship that is broadly analogous to marriage, and grant these partnerships all the relevant rights and protections at law. For those couples wishing to make a public and binding commitment to each other, I support the idea of national 'civil partnership/union' register, which would alter the legal status between couples in the same way that a registered marriage does, and could be performed by celebrants authorised to conduct civil union ceremonies.

I urge the Senate to maintain the current definition of marriage as a relationship between a man and woman, and instead to pursue other legislative means to recognise same-sex relationships and to provide them with equivalent rights at law as appropriate for a cohabiting and long-term committed relationship.

Yours sincerely,

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