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***What's sex got to do with it?* Submission to the Standing Committee on Social Policy and Legal Affairs in response to its inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012**

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1. Introduction

1.1. The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2. PIAC's work on gay, lesbian, transgender and intersex rights

PIAC has advocated for the rights of gay, lesbian, transgender and intersex people principally through representing plaintiffs in vilification and sexuality discrimination claims in New South Wales (NSW). PIAC acted in the first case for homosexual vilification on behalf of its client, Gary Burns, against radio personalities Mr Steve Price and Mr John Laws and Radio 2UE in relation to comments made about a gay couple appearing on the television show, *The Block*.¹ PIAC also represented the applicants in the case of *OV & OW v Wesley Mission*,² which is the leading case in NSW about sexuality discrimination and the 'religious bodies' exception.

¹ *Burns v Radio 2UE Pty Ltd & Ors* [2004] NSWADT 267 (22 November 2004).

² *OV v QZ (No.2)* [2008] NSWADT 115 (1 April 2008); see also *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5 (27 January 2009); *Members of the Board of the Wesley Mission Council v OW and OV (No 2)* [2009] NSWADTAP 5; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

In relation to marriage, which is the subject of this inquiry, PIAC has previously made a number of submissions supporting an inclusive definition of marriage. In 2004, PIAC made a joint submission with the National Association of Community Legal Centres Australia (NACLC)³ opposing amendments to the *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth) (including the introduction of the current definition of marriage, which is the subject of this inquiry). PIAC has also made submissions to the (then) Human Rights and Equal Opportunities Commission's *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*⁴ and the Senate Standing Legal and Constitutional Affairs Committee's Inquiry into the Marriage Equality Bill 2009 (Cth)⁵.

In each of these submissions PIAC called on the Australian Government to amend the definition of marriage to allow all Australian adult couples to marry, irrespective of their sex. In this submission, PIAC reiterates many of the comments it has previously made in support of marriage equality.

PIAC takes the view that equal rights to marry should be extended to everyone irrespective of their sexuality, gender or gender identity and that the Government (and Parliament) should amend the Marriage Act accordingly.

1.3. Background to the current bills

On 8 February 2012, Senator Sarah Hanson-Young presented a private member's bill, the Marriage Equality Amendment Bill 2010 (the Hanson-Young Bill) to the Senate. This bill is currently the subject of an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs.

Five days later, two private members' bills were introduced to the House of Representatives. On 13 February 2012, Adam Bandt MP presented the Marriage Equality Amendment Bill 2012 (the Bandt Bill). On the same day, Stephen Jones MP introduced the Marriage Amendment Bill 2012 (the Jones Bill) to the House of Representatives. These two bills were referred to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report.

The main objective of each of the Bills is to amend the definition of marriage contained in s 4, and remove s 88EA of the Marriage Act (which prohibits the recognition of same-sex marriages

³ Public Interest Advocacy Centre and National Association of Community Legal Centres, *Joint submission to the Senate Legal and Constitutional Committee's Inquiry into the Marriage Amendment Bill 2004* (2004).

⁴ Public Interest Advocacy Centre, *Submission to the Human Rights and Equal Opportunity Commission National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2006), Australian Human Rights Commission <http://www.hreoc.gov.au/human_rights/samesex/inquiry/submissions.html> at 1 March 2012.

⁵ Robin Banks, *Submission to the Senate Standing Legal and Constitutional Affairs Committee in response to its Inquiry into the Marriage Equality Amendment Bill 2009 (Cth)* (2009), Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality/submissions/sublist1a.htm> at 1 March 2012.

conducted overseas).

Both the Bandt and Hanson-Young Bills propose a new definition of marriage as ‘the union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life’. The Jones Bill proposes that marriage should be defined as ‘the union of two people, regardless of their sex, to the exclusion of all others, voluntarily entered into for life’.

All three bills remove s 88EA from the Marriage Act and make other consequential changes. Finally, the Bandt and Jones Bills make it clear that none of the amendments would impose obligations on ministers of religion to solemnise the marriage of same-sex couples.

2. Support for the Bills

PIAC strongly supports the Bandt and Jones Bills, although it does not express a preference as to which Bill should be recommended by the Committee to the House of Representatives as it believes that either Bill, if passed in its entirety, would lead to full marriage equality.

Through its clients’ experience, PIAC is familiar with the stigma, vilification and unlawful discrimination that same-sex couples, and families led by same-sex couples experience every day. This experience demonstrates that same-sex couples do not fully enjoy protection and fulfilment of their human rights to equality before the law.

PIAC firmly believes that the Marriage Act should be amended to remove the discriminatory references contained in ss 4 and 88EA of the Act in order to allow people the right to marry, irrespective of their sex.

As PIAC and NACLC argued in their joint submission to this Committee in 2004:

In recognition of the important function of marriage in the Australian community as a public acknowledgement of a binding relationship, PIAC and NACLC submit that marriage as a civil legal status should be available to any two people who chose to enter such a partnership, regardless of their gender.

There is a clear distinction between marriage as a religious rite and marriage as a civil union recognised in the law. The religious blessing of a marriage is a matter for members of particular congregations to decide.

On the other hand, state sanction and legal recognition of marriage is a matter of equality before the law and should be available to all couples who wish to enter into a civil union and have this union recognised in Australian law.⁶

Recommendation

Parliament should pass either the Bandt or Jones bill in its entirety.

⁶ PIAC & NACLC, above n 3, 5.

2.1. Changing definition of marriage in Australia

The current definition of marriage is relatively new; the Howard Government only inserted it into the Marriage Act in 2004. This was a significant change as it entrenched a definition of marriage where none had previously existed. Indeed, the Menzies Government, which introduced the Marriage Act, saw marriage as a fluid institution, the changing meaning of which the common law courts would be better able to monitor and respond to.⁷

Prior to the current statutory definition of marriage being encapsulated in legislation, the courts were committed to the task of ascertaining and applying contemporary meanings of marriage in the cases arising before them.⁸ For example, in the case of *The Attorney-General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission*⁹, the Family Court of Australia recognised the right of a post-operative transsexual to recognition of her re-assigned sex and, consequently, her right to marry a person of the opposite sex. The Court in that case decided that the meaning of marriage in the Constitution was not 'frozen in time' at the date on which the Constitution was enacted.¹⁰

The definition of marriage entrenched by the *Marriage Amendment Act 2004* (Cth) is that stated by Lord Penzance in *Hyde v Hyde and Woodmansee* in 1856 to be "[t]he voluntary union for life of one man and one woman, to the exclusion of all others".¹¹ However, as the Honourable Alastair Nicholson QC, former Chief Justice of the Family Court of Australia, has observed:

Lord Penzance's definition was inaccurate at the time that he gave it and remains inaccurate today. It is difficult to understand how even in 1866, marriage could have been defined as union for life, having regard to the passage of the *Divorce and Matrimonial Causes Act* in England in 1857. Given that about 40% of Australian marriages now end in divorce, it is a nonsense to refer to marriage as a union for life today.

Similarly, since the concept of matrimonial fault has been abolished by the *Family Law Act 1975* and in particular that adultery is no longer a ground for divorce, it is difficult to argue that a modern marriage necessarily excludes all others...¹²

The meaning of marriage in Australia is not fixed and has been altered by both the courts and legislature responding to changing community expectations. The question therefore becomes: what should be the definition of marriage in Australia in 2012? As explained below, PIAC

⁷ Senate Hansard, 18 April 1961, 547-544.

⁸ *Re: Wakim ex parte McNally* (1999) 198 CLR 511.

⁹ [2003] FamCA 94.

¹⁰ *Ibid*, per Nicholson CJ, Ellis & Brown JJ [100].

¹¹ [L.R.] 1 P & D. 130.

¹² Nicholson AO RFD QC, 'The Legal Regulation of Marriage' (Speech delivered to the Law Student's Society, Faculty of Law, University of Melbourne, Melbourne, 16 September 2004).

contends that the best answer is found by reference to Australia's international human rights obligations.

2.2. Internationally recognised right to non-discrimination, equality and marriage

The rights to freedom from discrimination and equality before the law are set out in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights*¹³ (ICCPR). Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The prohibition against discrimination is also said to be an 'autonomous right' that prohibits discrimination in 'law or in fact in *any field* regulated and protected by public authorities' (emphasis added).¹⁴

Although Article 26 does not specifically refer to 'sexual orientation', the Human Rights Committee has found that 'sex' or 'other status' encompasses sexual orientation and is therefore intended to protect people from discrimination on the basis of sexual orientation.¹⁵

The human right to marry and found a family is articulated in Article 23 of the ICCPR and Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights*¹⁶ (ICESCR). Article 23 of ICCPR entitles the family, as the natural and fundamental group in society, to recognition and protection by the state.

Opponents to same-sex marriage sometimes point to the case of *Joslin v New Zealand*,¹⁷ as providing authority for the proposition that international law supports discrimination against same-sex couples wishing to marry. PIAC acknowledges that, in this case, the Human Rights Committee concluded that 'a mere refusal to provide for marriage between homosexual couples' did not constitute a breach of the ICCPR. However, for three key reasons, the majority approach in *Joslin* should be approached with great caution.

¹³ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

¹⁴ General Comment No 18: Non-discrimination (10/11/89) CCPR General Comment No 18, para 12.

¹⁵ See comments of the Human Rights Committee in *Toonen v Australia*, (488/1992) UN Doc. CCPR/C/50/D/488/92; and *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000.

¹⁶ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

¹⁷ *Ms Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, UN Doc. A/57/40.

First, the case law in this area is far from settled. *Joslin* was heard over a decade ago and approaches to same-sex marriage have progressed significantly during this period. State practice, which is a legitimate influence on interpreting the contemporary meaning of the provisions of the ICCPR, is instructive here.

Of the 10 states that now recognise same-sex marriage at the national level, nine of them (Argentina, Belgium, Canada, Iceland, Norway, Portugal, South Africa, Spain and Sweden) have amended their laws to do so since the decision in *Joslin*. Many other provincial jurisdictions also now recognise or perform same-sex marriage – including 11 US states. Many more jurisdictions recognise a corresponding form of civil union for same-sex couples – including, in Australia, the ACT, NSW, Queensland, Tasmania and Victoria.

This suggests a consensus starting to develop against the continuation of discrimination against same-sex couples wishing to marry. Thus, PIAC contends that the better view is that the failure to recognise a right to marry when a couple is recognised as a family in other areas of law is inconsistent with Article 26 of the ICCPR because it denies a particular kind of recognition to some couples on the discriminatory ground of their gender or sexuality.

Secondly, PIAC agrees with the arguments put forward by the Human Rights Law Centre as to why this case fails to make a compelling case for continued discrimination against same-sex couples in this context, in particular because the Human Rights Committee failed to consider how Article 23 of the ICCPR interacted with the principle of equality contained in Article 26.¹⁸

Thirdly, even putting the case at its highest, *Joslin* says no more than state parties to the ICCPR are not compelled to provide for same-sex marriage. As was clear from this case, the ICCPR in no way prohibits states from recognising same-sex marriage. Consequently, an approach more consistent with contemporary understandings of human rights would be for Parliament to permit and recognise same-sex marriage.

2.3. Impact on other rights

It is essential that the rights to equality and marriage appropriately accommodate any other competing rights, notably the right to freedom of religion. Both the Bandt and Jones Bills do just this, by amending s 47 of the Marriage Act to make it clear that nothing in the Marriage Act imposes an obligation on a minister of religion to solemnise the marriage of a same-sex couple.¹⁹

¹⁸ Human Rights Law Centre, *Marriage Equality – A Basic Human Rights. Submission to the Inquiry into the Marriage Equality Amendment Bill 2009* (2009), Parliament of Australia
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality/submissions/sublist1a.htm at 12 March 2012, 6-8.

¹⁹ Marriage Equality Amendment Bill 2012, sch.1, s. 8; Marriage Amendment Bill 2012, sch. 1, s. 3.

PIAC takes the view that neither bill would have a negative impact on other fundamental human rights but suggests that, for the avoidance of doubt, a provision similar to s 3 of schedule 1 of the Jones bill should be enacted as part of the changes to the Marriage Act.²⁰

Recommendation

The Parliament should amend s 47 of the Marriage Act to make it clear that nothing in the Act imposes an obligation on a minister of religion to solemnise the marriage of a same-sex couple.

2.4. Impact on the community

One of the concerns that has been raised in respect of the proposals contained in the Bandt and Jones Bills is that changes to the Marriage Act may have a negative impact on families and the community. However, opinion polls in Australia consistently reveal strong support for marriage equality. In November 2011, a Herald/Nielsen opinion poll found that 62% of voters supported legalising same-sex marriage.²¹ Similar levels of community support for same-sex marriage were reported in other opinion polls conducted in 2010²² and August 2011²³.

The argument that legalising same sex marriages will harm the family unit is similarly flawed, partly because it overlooks the fact that same-sex couples are already raising children in Australia and partly because this argument is not supported by the evidence. For example, studies have shown that children from lesbian families rated more highly in social and school areas²⁴ and experience the same quality of life as children with heterosexual parents²⁵.

²⁰ PIAC prefers this provision to sch 1, s 8 of the Bandt bill as it more clearly addresses the issue of separating marriages under the law to marriages recognised by religions.

²¹ Phillip Coorey, 'Voter Opinion adds Weight to Shift in Marriage Policy', *Sydney Morning Herald online* ((15 November 2011) < <http://www.smh.com.au/national/voter-opinion-adds-weight-to-shift-in-marriage-policy-20111114-1nfkj.html>> at 27 March 2012.

²² see for example, a Galaxy research poll in 2010 found 62% supported same sex marriage reported by Australian Marriage Equality, *Marriage Equality and Public Opinion. A Factsheet* (2011), Australian Marriage Equality <<http://www.australianmarriageequality.com/wp/wpcontent/uploads/2010/10/AMEpollfactsheet@Jun11.pdf>> at 27 March 2012.

²³ see, for example, Roy Morgan poll in August 2011 found 68% supported same sex marriage cited by Australian Marriage Equality Group, *ibid*; see also News Ltd Poll in August 2011 found 7 out of 10 Australians supported same sex marriage reported by Dan Fisher, 'Alternative Census Reveals the Real Australia', *Daily Telegraph online* (9 August 2011) < <http://www.dailytelegraph.com.au/lifestyle/alternative-census-reveals-the-real-oz/story-e6frf00i-1226111802140>> at 27 March 2012.

²⁴ see for example, Gartrell N, Bos H., 'US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents', (2010) 126(1), *Pediatrics*, 1-9 < <http://www.nllfs.org/images/uploads/pdf/NLLFS-psychological-adjustment-17-year-olds-2010.pdf>> at 27 March 2012.

²⁵ see for example, van Gelderen, L., Bos, H., Gartrell N., and Perrin, E., 'Quality of Life of Adolescents Raise from Birth By Lesbian Mothers: The US National Longitudinal Family Study', (2012), 33(1), *Journal of Developmental & Behavioural Pediatrics*, 1-7 < <http://www.nllfs.org/images/uploads/pdf/nllfs-quality-life-january-2012.pdf> > at 27 March 2012.

2.5. Alternative options

An alternative to amending the Marriage Act is to introduce a registered civil unions scheme for same-sex couples in Australia. While PIAC acknowledges that this is the approach that has been adopted in a number of other jurisdictions, including Denmark, Norway, Sweden, Iceland and New Zealand, PIAC takes the view that this approach does not fully eradicate discrimination against same-sex couples. To some extent, by failing to provide equal recognition of committed same-sex relationships, it might even reinforce the notion that committed relationships between heterosexual and homosexual couples are not equal.

2.6. Overseas experience

Finally, PIAC contends that Australia could benefit from overseas experience as to how marriage should be defined in Australia.

As noted above, an increasing number of countries have legalised same-sex marriages. Furthermore, the experience of these countries suggests that marriage equality doesn't negatively affect the institution of marriage. For example, since the Danish government introduced 'registered partnership' laws in 1989, the rate of heterosexual marriage has increased.²⁶

On the other hand, there are a number of historical examples that show the folly, or worse, of prohibiting certain types of marriage or relationship on the basis of discriminatory notions of who should be allowed to marry. For example, in 1949 the South African National Party introduced the *Prohibition of Mixed Marriages Act*, which banned mixed marriages in South Africa. In subsequent Acts, such as the *Immorality Act 1957*, this prohibition was expanded to include sex, and later kissing between white South Africans and South Africans from other ethnic groups. It is estimated that over 11,500 people were convicted under these laws. Punishments included prison sentences of up to seven years and lashings if the man was less than 50 years old. Methods used to produce evidence of breaches of the laws included 'binoculars, tape recorders, two-way radios and feeling if bedsheets were warmed and stained'²⁷.

Other examples include the *Law for the Protection of German Blood and German Honour*, introduced by the Nazi Government in 1935, which prohibited marriage and sex between Jews and other Germans, and the so-called 'anti-miscegenation' laws in the United States of America, which banned marriages between members of different ethnic groups. Today these laws are almost-universally considered abhorrent. These examples should serve as a reminder of the dangers inherent in a state imposing rigid and discriminatory definitions of marriage on its

²⁶ Giedre Zukaite 'Does the Prohibition on Same-Sex Marriage Violate Fundamental Human Rights and Freedoms?' (2005) 2 *International Journal of Baltic Law* 1-24, 17.

²⁷ see *Legislative Implementation of Apartheid*, US Library of Congress <<http://countrystudies.us/south-africa/25.htm>> at 29 March 2012 ; see also *Apartheid Laws* <<http://history8tl.weebly.com/the-prohibition-of-mixed-marriages-act-of-1949-no-55-immortality-amendment-act-of-1957-no-24.html>>.

citizens. The members of the current Australian Parliament should consider carefully how history will judge them if they were to vote for continued discrimination against same-sex couples.

3. Conclusion

PIAC has long held the view that the Marriage Act should be amended to remove the discriminatory references contained in ss 4 and 88EA so as to allow people to marry irrespective of their sex, gender or gender identity. Consistent with this view, PIAC strongly encourages the Parliament to pass the Jones or Brandt Bill so that same sex-couples can finally be afforded the protection and fulfillment of their human right to full and equal treatment and recognition before the law.