

# CHAPTER 2

## Background

2.1 According to the Australian Bureau of Statistics (ABS), in 1996, 0.2% of all adults said they were living with a same-sex partner. By 2006, this had increased to 0.4% (approximately 50,000 people). However, the ABS noted that:

These figures may be an undercount of the true number of people living in same-sex relationships. Some people may be reluctant to identify as being in a same-sex relationship, while others may not have identified because they didn't know that same-sex relationships would be counted in the census.<sup>1</sup>

2.2 Understanding the legislative, social and international context of the Marriage Equality Amendment Bill 2009 (Bill) helps to identify and appreciate the key issues and concerns raised by submitters during the committee's inquiry.

### **The Marriage Equality Amendment Bill 2009 – A Summary**

2.3 The Bill would amend the Marriage Act to, 'remove all discrimination from the Marriage Act on the basis of sexuality and gender identity [and] to permit marriage regardless of sex, sexuality and gender identity.'<sup>2</sup>

2.4 The Bill seeks to achieve this by amending the definition of 'marriage', contained in subsection 5(1) of the Act, so as to read 'the union of two people, regardless of sex, sexuality or gender identity, voluntarily entered into.' The Bill also makes consequential amendments to remove references to 'a man and a woman'. Further, where the marriage celebrant is not a minister of religion, the amendments would allow the marriage to be solemnised according to any form and ceremony, and in the words of the parties' own choosing that they be lawfully wed.

2.5 While the legislative mechanics of the Bill are relatively simple, the potential implications of enacting such an amendment have raised significant community discourse and debate. This report seeks to navigate the concerns raised by submitters to this inquiry by first establishing the context of these discussions and then discussing the arguments put in favour and against the passage of the Bill. Finally, this report draws certain conclusions about the debate and makes recommendations for how best to deal with this legislation.

### **The Legislative Context**

2.6 While subsections 51(xxi) and 51(xxii) of the Constitution give the Commonwealth Parliament 'the power to make laws for the peace, order and good

---

1 Australian Bureau of Statistics, *Australian Social Trends: 4201.0*, March 2009, p.7. Available at: [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F761FF864FAA448CA2575830015E923/\\$File/41020\\_couples.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6F761FF864FAA448CA2575830015E923/$File/41020_couples.pdf) (accessed 12 November 2009).

2 Senator Sarah Hanson-Young, *Senate Hansard*, 24 June 2009, p. 4176.

government of the Commonwealth with respect to Marriage, Divorce and matrimonial causes, and in relation to parenting rights and the custody and guardianship of infants',<sup>3</sup> marriage law in Australia was state-based until the 1961 passage of the Act.

2.7 On its passage through Parliament, the Act did not include a definition of 'marriage'. Senator Gorton, who was responsible for the carriage of the Bill through the Senate, remarked:

... in our view it is best to leave to the common law the definition or the evolution of the meaning of 'marriage' as it relates to marriages in foreign countries and to use this bill to stipulate the conditions with which marriage in Australia has to comply if it is to be a valid marriage.<sup>4</sup>

2.8 However, the Act (at section 46) included a provision that a celebrant, in explaining the nature of a marriage relationship, must say the words:

...Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life...<sup>5</sup>

2.9 While the section 46 description was not a definition, the *Marriage Amendment Act 2004*, among other things, amended the Act to insert these words as the formal definition of 'marriage'. The *Marriage Amendment Act 2004* also inserted section 88EA which provides that same-sex marriages solemnised in a foreign country would expressly not be recognised as a marriage in Australia, a matter that hitherto had been uncertain.

2.10 The Senate Legal and Constitutional Affairs Committee conducted an inquiry into the Marriage Amendment Bill 2004. The committee was instructed by the Senate to specifically consider:

- the legal interpretation of the marriage power in the Constitution, and the extent of this power with regard to the creation of marriage law and the recognition of foreign marriages;
- whether the Bill raises international comity issues, or inconsistency with laws, policies and standards of domestic and overseas jurisdictions;
- whether the Bill breaches international instruments including the Hague Convention and human rights mechanisms prohibiting discrimination on the grounds of sexual orientation;
- whether the Treaties relied upon in Schedule [2] of the Bill provide the Commonwealth with the necessary power to act, and how this action interferes with state and territory responsibilities to legislate for and to run adoption processes;

---

3 Subsections 51(xxi) and 51(xxii), *The Commonwealth Constitution Act 1901*.

4 *Senate Hansard*, 18 April 1961, p. 554.

5 *Marriage Act 1961*, subsection 46(2).

- the consequences of the Bill becoming law, and those remaining avenues available to the Commonwealth for legally recognising inter-personal relationships including same-sex relationships; and
- the government's insistence that this Bill be introduced as a matter of urgency when there has been no demonstrated reason for its urgent introduction and no community consultation on the provisions of the Bill.<sup>6</sup>

2.11 However, on 31 August 2004, before the committee was due to report, the Governor-General prorogued the 40<sup>th</sup> Parliament and the committee decided not to proceed with the inquiry. During the course of that inquiry, the committee received over 16,000 submissions from interested stakeholders.

2.12 It should be noted that in Australia at the time of this report, three States/Territories have systems which allow same-sex couples to register their relationships. Tasmania, Victoria and the Australian Capital Territory currently allow civil unions. While these unions are recognised for the purposes of some Commonwealth Acts, these civil union schemes are only open to residents of the particular state or territory that provides them. The City of Melbourne, Yarra City Council and the City of Sydney provide a registration system allowing same-sex couples to formally declare a relationship.

#### ***Further Constitutional considerations***

2.13 The committee notes that concerns about the constitutional validity of the Bill were raised during the inquiry. The Gilbert and Tobin Centre of Public Law reminded the committee that, while section 51(xxi) of the Australian Constitution gives the Commonwealth Parliament power to make laws with respect to 'marriage', that power is not further defined by the Constitution, and the power may or may not extend beyond its current terms as a 'union between a man and a woman to the exclusion of all others voluntarily entered into for life'.<sup>7</sup>

2.14 The Gilbert and Tobin Centre suggests that the High Court could adopt at least 2 different approaches to defining marriage for the purposes of the Constitution. If the Court were to look to the intentions of the framers of the Constitution, it may be persuaded that the Commonwealth's power is limited to marriages of two different sexes. However, drawing on comments by Justice McHugh in the *Singh*<sup>8</sup> and *Wakim*<sup>9</sup> cases, the Gilbert and Tobin Centre observe that:

...it might be argued that gender is not central to the constitutional definition of 'marriage', which is instead focussed upon the commitment of two people to a voluntary and permanent union. This would be an example of an evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall

---

6 Senate, *Journals of the Senate No. 153*, 23 June 2009, pp. 3652-3.

7 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 2.

8 *Singh v Commonwealth* (2004) 209 ALR 355 at 371.

9 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 553.

within those concepts. The fact that a same-sex union was not within the intended meaning of 'marriage' 1901 need not preclude such an interpretation today.<sup>10</sup>

2.15 The Gilbert and Tobin Centre concludes that:

On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed the most likely conclusion is that the meaning which is currently employed by the Marriage Act represents the full extent of the Commonwealth's power.<sup>11</sup>

2.16 The Centre goes on to a similar conclusion in respect of the external affairs power (section 51 xxix), but also find that the Commonwealth could safely enact laws for same-sex marriage were the states to refer their powers to the Commonwealth to do so, concluding that:

The Commonwealth can then use this referred power to make laws for same-sex marriage under section 51(xxxvii). If the Commonwealth and all States were in favour of providing for same-sex unions, this would be the simplest and most certain constitutional method of achieving this.<sup>12</sup>

## **The International Context**

2.17 In developed jurisdictions around the world, the issue of same-sex marriage has only relatively recently become a matter for broader public discussion, accompanied by support for the removal of legislative discrimination on the basis of sex, sexuality or gender identity.

### ***Legislative approaches around the world***

2.18 In 2001, two years after Denmark became the first country to recognise same-sex civil unions, the Netherlands became the first country to pass legislation allowing same-sex couples to be married. Since that time, six other countries have passed similar laws that apply nationally. These are Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2007) and Sweden (2009). In a further 40 countries, there is either national or state/provincial legislation allowing for the legal recognition of same-sex relationships.

2.19 The Civil Union Bill in New Zealand was given Royal Assent on 13 December 2004<sup>13</sup>, allowing same-sex couples the same rights as married couples in child custody, taxation and welfare matters.

2.20 In 1996, both the United States Congress<sup>14</sup> and Senate<sup>15</sup> passed the 'Defence of Marriage Act'<sup>16</sup> which provided that no State was required to recognise, as a

---

10 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 2.

11 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 3.

12 Gilbert and Tobin Centre of Public Law, *submission m49*, p. 4.

13 Available at [http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323385.html?search=ts\\_act\\_civil+union\\_rese&p=1&sr=1](http://www.legislation.govt.nz/act/public/2004/0102/latest/DLM323385.html?search=ts_act_civil+union_rese&p=1&sr=1) (accessed 11 November 2009).

marriage, a relationship between persons of the same-sex, even if that relationship is recognised as a marriage in other States. The Defence of Marriage Act was signed into law by President Bill Clinton on 21 September 1996. Since the passage of the Defence of Marriage Act, five US States have passed legislation legalising same-sex marriages. These include Massachusetts, Connecticut, Iowa, and Vermont, each of which has legislation in effect, while New Hampshire's legislation will commence on 1 January 2010.

### ***International agreements and obligations***

2.21 One important feature of the discussion of same-sex marriage relates to Australia's obligations under international Human Rights treaties and agreements. Whether (or not) Australia is in compliance with these obligations was a matter raised by a number of witnesses. (Evidence received from submitters in relation to this matter, and a discussion of the committee's conclusions, are contained in chapters 3, 4 and 5 of this report.)

2.22 Article 16 of the United Nations Universal Declaration of Human Rights states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>17</sup>

2.23 Australia is also a signatory to the International Covenant on Economic, Social and Cultural Rights, which accords rights to the family, with reference to marriage being entered into with the free consent of the intending spouses.<sup>18</sup> Article 23 of the International Covenant on Civil and Political Rights, to which Australia is also a signatory, also outlines that party countries 'recognise the right of *men and*

---

14 Available at <http://clerk.house.gov/evs/1996/roll316.xml> (accessed 10 November 2009).

15 Available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=2&vote=00280](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280) (accessed 10 November 2009).

16 Available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR3396> (accessed 10 November 2009).

17 Article 16, United Nations, *Universal Declaration of Human Rights*, 10 December 1948. Available at <http://www.un.org/en/documents/udhr/> (accessed 11 November 2009).

18 Article 10(1), United Nations High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed 11 November 2009).

women of marriageable age to marry and found a family' (emphasis added).<sup>19</sup> This treaty also outlines that party countries should take appropriate steps to ensure the equality of rights of spouses as to marriage, during marriage and at its dissolution.<sup>20</sup>

2.24 In a 2002 case, dealt with by the United Nations Human Rights Committee (UNHRC), members of the UNHRC found that the relevant party country (New Zealand) had not violated the human right to marry contained in Article 23 by refusing to allow same-sex marriage.<sup>21</sup> The UNHRC noted that:

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.<sup>22</sup>

2.25 Since this ruling, the discussion of same-sex marriage has turned on the interpretation of the phrase 'men and women' in Article 23. In the abovementioned case, the UNHRC understood the phrase to be one term, citing the use of other terms such as 'every human being', 'everyone' or 'all persons' elsewhere in the Covenant. The UNHRC therefore understood the explicit and specific reference to 'men and woman' to mean a union between a man and a woman. Others argue that, as public discussion of same-sex marriage intensifies, the UNHRC is increasingly likely to reinterpret the phrase to mean 'men as a group and woman as a group', noting that the reference is clearly less strict than 'the union of a man and a woman to the exclusion of all others'.<sup>23</sup>

---

19 Article 23, United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 11 November 2009).

20 Article 23(4), United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, 16 December 1966. Available at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 11 November 2009).

21 See *Joslin et al V New Zealand*, United Nations Human Rights Committee, UN. Available at <http://documents-dds-ny.un.org/doc/UNDOC/DER/G02/441/12/pdf/G0244112.pdf?OpenElement> (accessed 11 November 2009).

22 UNHRC, *Joslin et al V New Zealand*, Doc CCPR/C/75/D/902/1999, 17 July 2002, p. 11. Available at <http://documents-dds-ny.un.org/doc/UNDOC/DER/G02/441/12/pdf/G0244112.pdf?OpenElement> (accessed 11 November 2009).

23 See, for example, Castan Centre for Human Rights Law, *Submission m87*, p. 8.

---

***Recognition of marriage from other jurisdictions (including polygamy)***

2.26 One important aspect of marriage legislation in every jurisdiction is the mechanism for recognising (or otherwise) marriages that were celebrated or given legal standing in other jurisdictions. For example, a feature of the Defence of Marriage Act in the United States is that federal laws do not prevent State's from enacting legislation that legalises same-sex marriage, however the federal law also doesn't require other states to recognise that marriage as legitimate. Similar principles apply across country borders.

2.27 As noted above, the *Marriage Legislation Amendment Act 2004* in Australia provided that same-sex unions solemnised in a foreign country would not be recognised as a marriage in Australia. However, while Australian law doesn't generally recognise foreign polygamous relationships as marriage, the *Family Law Act 1975* deems foreign polygamous marriages to be marriage for children's matters or property alterations (for example).<sup>24</sup>

**The Social Context**

2.28 Discussions of same-sex marriage invariably involve lengthy debate about what role marriage itself plays in society and the implications that legalising same-sex marriage might have on families and society in general. Nonetheless, people generally agree that the state should not unduly intervene in private relationships without strong policy justification. During the inquiry, the committee heard evidence on what impact passage of the Bill might have on children of same-sex parents within a marriage relationship and what rights the Commonwealth currently extends to unmarried heterosexual and same-sex couples.

***Impact of Marriage on Children***

2.29 The Australian Institute of Family Studies (AIFS), an Australian Government Statutory body established to conduct research into the effects of Government programs on family wellbeing, has published a number of research papers which touch on issues relating to same-sex parent families. One important feature of the AIFS research relates to the significant diversity in the make up of families with same-sex parents. In a research paper published in 2003, the AIFS found that more same-sex parent families:

...are choosing parenthood within the context of their same-sex relationship through a variety of means including donor insemination and other assisted reproduction procedures, adoption or fostering. Thus, the extent to which family members are related biologically can differ (that is, one parent may or may not be the child's biological parent). The large proportion of children in current gay and lesbian families are likely to have been born or

---

24 Parliamentary Library, *Bills Digest: Marriage Amendment Act 2004*, p. 3.

adopted in the context of a heterosexual couple relationship that later dissolved.<sup>25</sup>

2.30 The AIFS, in that paper, also discussed concerns by some in the community about the potential negative effects of being raised in a gay- or lesbian-headed family, particularly in relation to children's gender identity, their personal and social development and the harm resulting from family disruption (on the assumption that gay and lesbian relationships are more short-lived than heterosexual relationships).

2.31 The AIFS found that most literature suggests that children raised by same-sex parents do not show poor adjustment when compared with other children. However:

...much of the available research has involved small, unrepresentative samples that are predominantly well educated, middle class and American. The degree to which results reflect sampling biases of the research, and their applicability in the Australian context, are thus difficult to evaluate.<sup>26</sup>

2.32 The committee recognises that there may be insufficient data collected within the Australian context to draw definitive conclusions about any impact that same-sex parenting may or may not have on children. This lack of data may also make it difficult to determine what factors might contribute to any outcome differences observed in children in same-sex parent families and whether those factors are a direct result of the particular family structure.

### ***Legal rights for unmarried couples***

2.33 On 30 April 2008, the Hon. Robert McClelland MP, Attorney-General announced that legislation to remove same-sex discrimination from a wide range of Commonwealth laws would be introduced to give effect to the recommendation of the then Human Rights and Equal Opportunity Commission (HREOC) 'Same-Sex: Same Entitlements' report.<sup>27</sup>

2.34 In 2008, the committee conducted separate inquiries into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, the Same-Sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Bill 2008 and the Same-Sex Relationships (Equal Treatment in Commonwealth Legislation – Superannuation) Bill 2008.<sup>28</sup> These bills amended more than 90 Commonwealth Acts to provide greater recognition and equal treatment of opposite- and same-sex de facto couples.

---

25 The Australian Institute of Family Studies, *Research Paper no. 30: Family Structures, Child Outcomes and Environmental Mediators*, January 2003, p. 26. Available at: <http://www.aifs.gov.au/institute/pubs/RP30.pdf> (accessed 12 November 2009).

26 The Australian Institute of Family Studies, *Research Paper no. 30: Family Structures, Child Outcomes and Environmental Mediators*, January 2003, pp. 26-27. Available at: <http://www.aifs.gov.au/institute/pubs/RP30.pdf> (accessed 12 November 2009).

27 The Hon, Robert McClelland MP, Attorney-General, 'Rudd Government moves on same-sex discrimination', 30 April 2008.

28 For more information about these inquiries, including copies of the Final Report, see [www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/).



2.35 The committee recommended that the bills be passed, subject to certain recommendations. Many of the committee's concerns were addressed and the bills passed and received Royal Assent in November and December 2008.<sup>29</sup>

2.36 During this inquiry, the committee heard evidence relating to this recognition of same-sex de facto relationships in Commonwealth laws. There was broad agreement that these measures were appropriate, however there was some discussion as to whether the changes went far enough to genuinely remove discrimination against same-sex couples.

---

29 The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* was assented to on 21 November 2009. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* was assented to on 2 December 2008. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* was assented to on 9 December 2008.

