



Inquiry into the Marriage Equality Amendment Bill 2009

Senate Legal and Constitutional Affairs Legislation Committee

28 August 2009

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Introduction

1. The Law Council of Australia is pleased to provide the following submission in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Marriage Equality Amendment Bill 2009* ('the Bill').
2. The Law Council is the peak representative body for the Australian legal profession as outlined in the Attachment to this submission. The Law Council understands that one of its Constituent Bodies, the Law Institute of Victoria is making a separate submission to the inquiry and that its submission supports the key points made in this submission.
3. The Bill aims to remove all discrimination from the *Marriage Act 1961* ('the Marriage Act') by permitting marriage equality for people regardless of sex, sexuality and gender identity.
4. The Bill will also remove the prohibition on the recognition of same-sex marriages entered into under the laws of another country.
5. The Law Council supports amendments that aim to remove discrimination on the basis of sex, sexuality and gender. The legal restriction on same-sex marriage is an important rule of law and human rights issue. All people are equal before the law and should be entitled to the same fundamental rights. The Law Council believes that discrimination against same sex couples cannot be adequately addressed without changing the law in relation to marriage.
6. These viewpoints have been expressed in a number of recent submissions by the Law Council. In June 2006 the Law Council made a submission to the then Human Rights and Equal Opportunity Commission to the inquiry into discrimination against same-sex couples.¹ In July 2008 the Law Council made a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill* and in September 2008, the Law Council made a submission on the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.² Furthermore, the Law Council looked at the issue again in the context of its August 2008 submission to the United Nations Human Rights Committee responding to Australia's Common Core Document.³
7. This submission aims to build on those previous submissions, by supporting the Bill and its role in removing discrimination against same-sex couples through amending the definition of marriage and recognising the status of same-sex marriages entered into under laws of a foreign country. The Law Council will limit its comments to the following issues:
 - (a) Amendments to the Marriage Act as a way in which to tackle discrimination against same-sex couples
 - (b) Equal recognition of foreign marriages for same-sex couples

¹ Law Council of Australia, *Same-Sex: Same Entitlements Discussion Paper 2006*, 16 June 2006 available at www.lawcouncil.asn.au.

² Law Council of Australia, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*, 25 July 2008; *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*, 16 Sep 2008. Both submissions are available at www.lawcouncil.asn.au.

³ Law Council of Australia, *Shadow Report to Australia's Common Core Document*, 29 August 2008 available at www.lawcouncil.asn.au.

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- (c) Article 23 and Article 26 of the International Covenant on Civil and Political Rights (ICCPR)
 - (d) The evolving concept of family and marriage, both domestically and internationally

Exclusion of Same Sex Couples from the Definition of 'Marriage'

8. Under section 5(1) the current definition of marriage under the *Marriage Act* provides that:

“marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”

9. Item 1 of the Bill repeals the definition of marriage under the *Marriage Act*, substituting

“marriage means the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into life.”

10. The Law Council is of the view that the current definition as provided under the *Marriage Act*, introduced following amendments made in 2004, operates in a discriminatory manner by specifically referring to the 'union between a man and a woman'. The consequence of a definition framed in these terms is to specifically exclude same-sex couples. As noted in the explanatory memorandum to the 2004 amendments:

“The purpose of the Marriage Amendment Bill 2004 (‘the Bill’) is to give effect to the Government’s commitment to protect the institution of marriage by ensuring marriage means a union of a man and a woman and that same sex relationships cannot be equated with marriage.”⁴

11. The effect of the current definition under the *Marriage Act* is that a significant number of Australian citizens are left without the full range of legal rights and protections that are conferred by marriage, solely on the basis of their sexuality and gender.
12. The Law Council supports a definition of marriage that involves 'the union of two people, regardless of sex, sexual orientation or gender identity to the exclusion of all others'. The Law Council recommends that the term 'sexuality' as specified in the Bill is replaced with the term 'sexual orientation'. Use of this term is more consistent with international law, particularly in respect to the interpretation of the ICCPR.⁵
13. The Law Council also recommends that 'to the exclusion of all others' is inserted so as to preclude polygamy and to reflect the common law definition of marriage.
14. By amending the definition of marriage, such that sex, sexual orientation or gender is not included as a determiner, it ensures that like relationships are treated equally. Such an amendment also removes the discriminatory operation of the current definition.

⁴ Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth).

⁵ For example see *Young v Australia* CCPR/C/78/D/941/2000 (18 September 2003) at 10.4

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15. The Law Council recognises that the Government is committed to eliminating discrimination against same sex couples. For example, the Law Council recognises the recent passage of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* and the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, which the Law Council supported.⁶
 16. Despite these legislative changes, more needs to be done. The Law Council strongly believes that discrimination against same-sex couples will continue without the federal government changing the law which prohibits the marriage of same-sex couples. Amending the current definition of marriage will not completely eliminate discrimination against same-sex couples; however it will go a long way to recognising their rights to be free from discrimination. It will also assist in removing the stigma that same-sex couples face in being unable to attain the same relationship status as heterosexual couples.

International Law and Same Sex Marriage

17. Article 23(2) of the ICCPR provides that:

“The right of men and women of marriageable age to marry and to found a family shall be recognised”.

18. The use of the phrase ‘men and women’ was found in 2002 in the case of *Joslin v New Zealand*⁷ by the United Nations Human Rights Committee (UNHRC) to only require States Parties to recognise marriage as existing between a man and a woman. However, other international jurisprudence, State practice and international instruments must also be considered.
19. Article 23 can be interpreted in line with other developments in international law. For example, the *Hague Convention on the Recognition and Celebration of Marriages* (the *Hague Convention*)⁸, to which Australia is a signatory, deliberately avoids a definition of marriage, with the intent that the term ‘marriage’ should be understood in its ‘broadest international sense’⁹. Furthermore, Article 23 can only be understood meaningfully if it is interpreted in light of other ICCPR rights, including the right to freedom from discrimination as expressed in Article 26.

20. Article 26 provides 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.”

⁶ See Law Council of Australia, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*, 25 July 2008 available at www.lawcouncil.asn.au and *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*, 16 Sep 2008 available at www.lawcouncil.asn.au.

⁷ CCPR/C/75/D/902/1999 (30 July 2002).

⁸ Opened for signature, 14 March 1978 [1991] ATS 16, entered into force for Australia and generally on 1 May 1991.

⁹ A Malmstrom, Explanatory Report, Actes et Documents de la XIIIe Session 1976, Tome III, p41, cited in ‘HREOC Submission to the Senate Legal and Constitutional Affairs Committee on the Provisions of the Marriage Legislation Amendment Bill 2004’, 26 August 2004.

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21. The UNHRC has expressed in previous decisions, such as *Young v Australia*¹⁰, that the obligation in Article 26 extends to an obligation to prevent discrimination in the law, such as on grounds of sexual preference, in the application of the law or in any action under the authority of the law.¹¹ This interpretation suggests that a narrow definition of marriage, as currently exists under the *Marriage Act*, could be inherently discriminatory against a particular sector of the Australian population.
22. In *Joslin* the concurring opinions of Committee members Lallah and Scheinin found that a denial of certain rights or benefits to same-sex couples that are available to married couples may very well amount to discrimination under Article 26, depending on the circumstances of the individual case.¹² Providing for civil unions where the rights extended to same-sex couples are not equivalent to that for married couples may be insufficient. Thus, amendments may need to be made which would necessarily place same-sex couples on an equal footing with heterosexual couples.
23. The failure to recognise those like rights means that the *Marriage Act* may be inconsistent with Article 23 and Article 26. Making amendments to the definition of 'marriage' such that it includes same-sex couples may remove the discriminatory effect of the legislation as it currently stands.
24. On 18 December 2008 the Australian government expressed its commitment to address discrimination on the basis of sexual orientation and gender by affirming a statement put forward by Argentina at the 70th and 71st meeting of the Sixty-Third United Nations General Assembly.¹³ Although the statement is non-binding it was designed to symbolise State Parties' respect for non-discrimination on the basis of sexual orientation and gender, including affirming a state's support for Article 26. The Australian Government should build upon this commitment, recognise that the discriminatory effect of the *Marriage Act*, and support the removal of the prohibition on marriage between same-sex couples to marriage.
25. Australia has received some criticism of its compliance with the ICCPR, in particular Article 26. In April 2009 the United Nations Human Rights Committee released its observations on Australia's compliance with the ICCPR.¹⁴ The Committee noted that it:

*"...remains concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law. (art. 2, and 26)"*¹⁵

26. The Committee also recommended that Australia:

*"...should adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination."*¹⁶

¹⁰ CCPR/C/78/D/941/2000 (18 September 2003).

¹¹ *Ibid* at 10.4.

¹² *Ibid* n6.

¹³ *General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by the Third Committee, on a wide range of Human Rights, Social, Humanitarian Issues*, UN GAOR, 70th and 71st Meetings, 63rd Plenary Session, UN Doc GA/10801. Available at <<http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>>

¹⁴ United Nations Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, Australia, CCPR/C/AUS/CO/5 (16 March – 3 April 2009).

¹⁵ *Ibid* at 12.

¹⁶ *Ibid*.

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27. The Law Council supports the Bill as one way in which to respond to the recommendations of the Committee. The current practice of prohibiting same-sex marriage fails to adequately provide protection to the rights to equality and non-discrimination for same sex couples. Ensuring the passage of the Bill will go some way to rectifying concerns about Australia's human rights policy.

Recognition of Marriages in Foreign Countries

28. The Bill also proposes to repeal section 88EA which provides that:

“A union solemnised in a foreign country between:

- a) a man and another man; or*
- b) a woman and another woman;*

must not be recognised as a marriage in Australia”

29. The Law Council supports repealing this section of the *Marriage Act* as proposed in the Bill. This section may operate in contravention to the *Hague Convention*, which provides that States parties should recognise marriages validly entered into under the law of another State .

30. As a signatory to the *Hague Convention*, Australia is prima facie required to recognise a marriage that is validly entered into in a foreign State under Article 9. The Article provides that:

“A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter. A marriage celebrated by a diplomatic agent or consular official in accordance with this law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration.”

31. While Articles 8, 11, 14 and 15 provide some exceptions to the recognition of marriages entered into in foreign States, the Law Council does not consider that these exceptions justify the existing prohibition on the recognition of same sex marriages entered into in a foreign State. In particular, the Law Council takes the view that same sex marriages should not be considered to be against public policy, particularly in the light of the evolving concept of family and marriage discussed below.

32. Section 88EA as it currently stands may be inconsistent with the *Hague Convention* by failing to recognise marriage in countries where a union between same-sex couples is allowed under the domestic legislation of that country. The Law Council supports the Bill in repealing this section of the *Marriage Act* under Item 5 of the Bill.

Evolving Concept of Family and Marriage

33. State practice in the field of same-sex marriage has significantly shifted in the last decade. When the case of *Joslin* was decided in 2002 international State practice was limited, with only the Netherlands recognising same-sex marriage. However, since that time a number of other countries have introduced legislation to that effect, including; Belgium, Canada, South Africa, Spain, Sweden, Norway as well as the Netherlands. In the United States of America a number of states now permit same-

sex marriage, including Massachusetts, Connecticut and Iowa, with Vermont and New Hampshire soon to complete the transition from civil unions to marriage.

34. A large number of countries have also decided to recognise civil unions for same-sex couples, including New Zealand, Denmark, Finland, France, Germany, Greenland, Mexico, Switzerland, Luxemburg, Uruguay, the Czech Republic and the United Kingdom.
35. In Australia civil unions and registered partnerships are recognised in a number of jurisdictions. In the Australian Capital Territory same-sex couples can enter into a civil union under the *Civil Partnership Act 2008* (ACT), whilst in Tasmania and Victoria same-sex couples can register their relationships under the *Relationships Act 2003* (Tas) and the *Relationships Act 2008* (Vic) respectively.
36. In Australian jurisprudence, the High Court has also foreshadowed that the concept of marriage may evolve. McHugh J, in *Re Wakim; Ex parte McNally* said:

*“...in 1901 ‘marriage’ was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably ‘marriage’ now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.”*¹⁷
37. It is clear that there is an evolving trend, both internationally and domestically, to recognise the rights of same-sex couples through legislative reform. To date this has largely been through relationship registers or civil unions. However, increasingly marriage is being redefined to apply to same-sex couples as a means to redress discrimination against same sex couples.
38. Legal reform of this nature is not unique, it is the natural progression of rights development as it accords with changes in social practice. As Sachs J noted in the seminal South African case on same-sex marriage, *Minister of Home Affairs and Another v Fourie and Another*:

*“...rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today.”*¹⁸
39. The Law Council supports the Bill subject to the following changes:
 - (a) Replace the term ‘sexuality’ with ‘sexual orientation’ in the Bill
 - (b) Insert the phrase ‘to the exclusion of all others’ in the proposed definition of marriage in Item 1 of the Bill

¹⁷ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553.

¹⁸ *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.