



30 August 2009

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Please find below a joint submission of The ALSO Foundation (**{also}**) and the Victorian Gay and Lesbian Rights Lobby (the **VGLRL**) to the Senate Legal and Constitutional Affairs Legislation Committee, in **strong support** of the *Marriage Equality Amendment Bill 2009* (The Bill).

About {also} and the VGLRL

Established in 1980, {also} works to enhance the lives of Victoria's diverse LGBTIQ communities. The {also} vision is the creation and celebration of a diverse, strong, safe and inclusive LGBTIQ community that contributes to and is respected by broader communities. We aim to realise this vision and improve the lives of LGBTIQ people by **celebrating** and acknowledging our communities' strengths and those of our supporters; **advocating** to secure equitable access to rights, entitlements and services; **leading** through building relationships and partnerships within and beyond our community; and **investing** in growing and developing individuals and groups within our diverse community.

The VGLRL aims to achieve equality and social justice for lesbian, gay, bisexual, transgender and queer people living in Victoria. We do this by working with the media, undertaking and supporting research, conducting community education and directly lobbying politicians across all levels of government. The VGLRL works co-operatively and constructively within the political framework, and the community at large, to achieve its aims. The VGLRL maintains a high level of community relevance through active collaboration with other organisations. The VGLRL is directly accountable to, and takes direction from, the LGBTIQ community

As the two peak bodies that advocate for the rights of LGBTIQ people in Victoria, {also} and the VGLRL are in a unique position to offer a LGBTIQ perspective to the inquiry. We hope that this submission will assist the Committee in its consideration of the Bill.

Introduction

With the passage of the Marriage Legislation Amendment Act in 2004, same-sex couples were explicitly excluded from marrying under Australian law. The passage of this law was contrary to Australia's obligations under both the International Covenant on Civil and Political Rights (ICCPR), which protects the right of all people to marry and to form a family, and the Convention on Celebration and Recognition of the Validity of Marriages (the Hague Convention), which requires the recognition of certain valid foreign marriages.

As a consequence, Australia is out of step with a growing number of other jurisdictions that do recognise same-sex marriage, including Canada, South Africa, Spain, Belgium, the Netherlands, Norway, Sweden, and the American States of Massachusetts, Connecticut, Vermont, Iowa, New Hampshire and Maine. A number of other governments are committed to, or in the process of harmonising their marriage laws, including Nepal, Portugal, Uruguay, Argentina, Iceland, Slovenia, and Luxembourg.

In its current form, the Marriage Act legalises and entrenches unacceptable discrimination against LGBTIQ people. The exclusion of LGBTIQ people from the Marriage Act denies them a right that is afforded to all other Australians. The Marriage Act is underpinned by the view that the relationships and commitments of LGBTIQ people are somehow different and inferior, and that they themselves can never be full and equal members of Australian society. This view is out of step not only with human rights norms and principles but also the recent moves by the Australian Government to remove discrimination against same-sex couples from all pieces of federal legislation, except the Marriage Act. Furthermore, it fails to reflect the reality of contemporary relationships and values in Australian society.

Recent evidence indicates that the majority of Australians (60 per cent) now support same-sex marriage.¹ These developments should be taken into account by the inquiry in its assessment of the Marriage Act.

¹ Galaxy Research (June 2009) *Same Sex Marriage Report* (Report prepared for Australian Marriage Equality) 5, available at <http://www.australianmarriageequality.com/Galaxy200906.pdf>

As stated in the preamble to the Universal Declaration on Human Rights, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Based on everyone’s inherent dignity, therefore, all human rights should be extended to all people, including LGBTIQ people. By their very nature, all human rights laid down in the international treaties are indivisible and interdependent. We submit that the Marriage Act should reflect an inclusive approach to marriage that upholds the basic human rights of *all* Australians – regardless of sexual orientation and gender identity.

In 2004, the American Anthropological Association (AAA) issued a statement strongly opposing a constitutional amendment in that country limiting marriage to heterosexual couples. The AAA relied on its professional expertise when it wrote:

The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution.²

The VGLRL and {also} commend the introduction of the *Marriage Equality Amendment Bill 2009*, which seeks to remedy marriage discrimination in Australia through:

- a) Removal from the *Marriage Act* (1961) of discrimination against people on the basis of their sexual orientation or gender identity; and
- b) Recognition that freedom of sexual orientation and gender identity are fundamental human rights; and
- c) Promotion of acceptance and the celebration of diversity.

The importance of these three factors in eliminating discrimination against LGBTIQ Australians will be expounded below. Furthermore, it is essential the committee take the following factors into account when determining their recommendation to the Senate:

- That marriage in Australia is a civil institution, not a religious institution
- That same-sex couplings feature the same conjugal and other personal and financial elements as heterosexual couplings, including marriage;
- that procreation and child rearing are no longer the definitive feature of heterosexual marriage alone;
- that the current restriction on same-sex marriage based on the procreation argument is

² AAA 2004

over - inclusive because non-procreative heterosexuals are permitted to marry, and under-inclusive because it denies same-sex couples with children the legal right to marry;

- that the common law exclusion of same-sex marriages does not reflect the capacities, needs and circumstances of same-sex couples; and
- that the difference in treatment of heterosexual and same-sex couples perpetuates the perception that the latter are less worthy of societal recognition and support.

Removal of discrimination against people, on the basis of their sexual orientation or gender identity, from the Marriage Act (1961).

As stated by the Supreme Court of Canada in *M. v. H.*, which upheld the right to seek spousal support from a same-sex partner with whom one has cohabited, the exclusion of LGBTIQ couples from the legal protections afforded heterosexual couples promotes the view that they are:

“...less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples...it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.”³

This sentiment is easily transferable to the issue of same-sex marriage, and the impact of this discrimination on the lives of LGBTIQ Australians.

In the past, under the individual communications process in the *First Optional Protocol to the ICCPR*, the United Nations Human Rights Committee (UNHRC) has found Australia to be in violation of such rights because of its different treatment of same-sex couples. In particular, in the *Toonen* case,⁴ the criminalisation of adult, consensual homosexual activity was found to violate the right to privacy, and in the *Young* case,⁵ the denial of a pension on the basis of the applicant’s sexual orientation was in violation of the art 26 right of non-discrimination.

It is not incomprehensible that future judgements may find the Marriage Act to be in violation of these ICCPR rights, as has been the case in the South African case of *Fourie*:

“...it follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-

³ *M. v. H.*, [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577, per Justices Cory and Iacobucci.

⁴ Human Rights Committee, *Communication No 488/1992: Australia 04/04/94* UN Doc CCPR/C/50/D/488/1992 (1994) (*Toonen v Australia*).

⁵ Human Rights Committee, *Communication No 941/2000: Australia 18/09/2003* UN Doc CCPR/C/78/D/941/2000 (*Young v Australia*).

definition in a most profound way.”⁶

The Australian government has responded positively to the views of the UNHRC in *Toonen* and *Young*: indeed, it even passed legislation to remedy the discriminatory treatment previously suffered by individual gay men and lesbians and same-sex couples⁷. These responses can be juxtaposed with Australia’s ongoing breach of the Hague Convention, to which Australia is also signatory.

The purpose of the Hague Convention is to “facilitate the celebration of marriages and the recognition of the validity of marriages” between ‘contracting States’. With the exception of certain marriages, as set out in Articles 8 and 11, it is generally accepted 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”. Australia has an obligation to recognise foreign marriages validly entered into in other contracting States (e.g. Canada), but the passage of the *Marriage Legislation Amendment Act (2004)* effectively prevents this from occurring.

The Hague Convention is underpinned by a general principle that marriage should be interpreted in its broadest sense. Article 5 of the Hague Convention provides that the “application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the State of celebration”. The Government’s policy on same-sex marriage does not reflect the majority views of Australians and, should therefore, change.

Recognise that freedom of sexual orientation and gender identity are fundamental human rights.

The most comprehensive examination of the relationship between internationally protected human rights and LGBTIQ people, including recommendations for State action, is contained in the Yogyakarta Principles⁸.

These principles were developed by an eminent group of human rights experts in 2007 that included, among others, Dr Elizabeth Evatt, former member and Chair of the UN Committee on

⁶ *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 1 [71]-[72] (Sachs J for the court)

⁷ The Australian Government responded by enacting a) the *Human Rights (Sexual Conduct) Act 1994* (Cth), which led to the invalidation of the Tasmanian law criminalising consensual adult homosexual activity under s 109 of the *Australian Constitution* and b) the recommendations of the *Same Sex: Same Entitlements* report.

⁸ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (March 2007)

the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists.

{also} and the VGLRL wholly support the spirit of the Yogyakarta Principles, and while recognising that the Principles are not legally binding, believe that any government committed to human rights principles broadly, should assist to realise these rights and to give effect to the recommendations contained within the Principles.

We also draw the Committee's attention to the UN General Assembly Declaration on Sexual Orientation and Gender Identity,⁹ which Australia signed in December 2008.

In signing this Declaration, Australia stated its deep concern regarding violations of human rights and fundamental freedoms based on sexual orientation and gender identity; committed to promoting and protecting the human rights of all persons, regardless of sexual orientation and gender identity; to ensuring that human rights violations based on sexual orientation or gender identity are investigated; and that perpetrators are held accountable.

Both the Principles and the Declaration seek to promote the realisation of rights for LGBTIQ people, across the full spectrum of public life. The VGLRL and {also} contend that the right to marry is consistent with the sentiment of both documents.

Further, under the ICCPR, to which Australia is also a party; Australia is committed to the protection and promotion of various human rights, including the right to privacy (article 17), the right to marry and found a family (article 23), and the right to be free from discrimination based on sexual orientation (article 26).

Further reform via enactment of the Bill would ensure the realisation of these articles of the ICCPR, especially when considered in light of recent comparative jurisprudence on the subject matters of the proposed amendments.

It cannot go without notice that the issue of marriage recognition is further complicated in the instance of transgender individuals. For instance, should a person within a marriage decide to undertake the challenging process of affirming their gender, they are forced to divorce in order to change their birth certificate and formally affirm their gender.

While the absence of a civil alternative to marriage is also of concern, it is the widely held view

⁹ UN General Assembly, 70th and 71st Plenary Meeting (18 December 2008)

of the LGBTIQ community that marriage is as much a symbolic issue as a legal one, and formal recognition of their relationships and the families they have formed is necessary to address this ongoing source of discrimination.

Promote acceptance and the celebration of diversity

The social and economic costs of persistent and widespread discrimination are borne in poorer status and opportunity outcomes for all key indicators in affected populations. There is also growing evidence that communities generally suffer adverse consequences related to unequal social status across the community, leading to a lack of social cohesion, diminished economic prosperity and increased public expenditure.

Research by Gay and Lesbian Health Victoria, VicHealth and others shows that pervasive discrimination leads to poorer health in those subject to it. This has direct costs, both to the quality of life of those affected, and to individual and community costs borne through the health system.

The Australian Medical Association has previously noted that in relation to intersex people:

“...anecdotal research indicates that experiences or expectations of discriminatory treatment may lead to decreased accessing of healthcare facilities. This has flow on effects for untreated mental and physical health problems.”¹⁰

It also has indirect costs, which are no less real. Reduced health means loss of educational opportunity or achievement, which results in lower lifetime and workplace productivity, a direct cost to the individual and to the economy.

Further to this, there is now a large body of research showing a direct link between reduced health outcomes for LGBTIQ people and their experiences of systemic discrimination and abuse. A recent national report on the health and wellbeing of same sex attracted and transgender young people (SSATYP) shows that over the last five years SSATYP have been subject to increased discrimination and abuse, particularly in the school environment.¹¹ A report by the VGLRL released in 2005; documents disturbingly high levels of abuse and discrimination against

¹⁰ Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p 365.

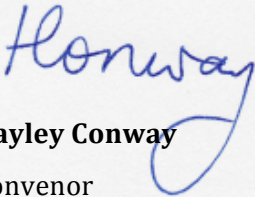
¹¹ Hillier, Lynne, Turner, Alma and Mitchell, Anne (2005) *Writing Themselves In Again: 6 years on — The 2nd national report on the sexuality, health and well-being of same sex attracted young people in Australia*. Australian Research Centre in Sex, Health and Society, La Trobe University Melbourne.

LGBTIQ people, same-sex couples and their families.¹² These volumes of research clearly demonstrate the link between social recognition and acceptance of same-sex relationships and the impact of having this recognition denied on both LGBTIQ Australians and society on the whole.

Conversely there is also a growing understanding that a range of social and economic benefits flow when communities promote equality of opportunity and act decisively to prevent and remedy discrimination. These benefits include improved access to skills in a shrinking labour market, increased voluntary social support and innovation and creativity, key drivers of economic growth. It can be argued therefore that it is in the interest of Australia's social and economic well-being to make every effort to end discrimination against the LGBTIQ community.

Conclusion

It is vital that this Bill be passed in order to fully realize the human rights of LGBTIQ Australians. A growing number of countries around the world are legally recognizing same-sex relationships, with Denmark celebrating the 20th Anniversary of their equal relationship laws this year. To allow this Bill to languish and to not recognise Australia's international legal obligations with regard to LGBTIQ human rights, will only perpetuate the already devastating effects of discrimination within our society. Passing this Bill will reaffirm Australia's image to itself and the world as an inclusive, tolerant society which values and protects the human rights of all.



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¹² McNair, R. and Thomacos, N. (2005) *Not yet Equal: Report on the VLGLR same sex relationship survey 2005*. Victorian Gay and Lesbian Rights Lobby with Gay and Lesbian Health Victoria Melbourne.