

28 August 2009

Committee Secretary  
Senate Legal and Constitutional Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir/Madam,

**RE: Submission to the Inquiry into the *Marriage Equality  
Amendment Bill 2009***

Thank you for the opportunity to make a submission to the Inquiry into the *Marriage Equality Amendment Bill 2009* ('the Bill').

The Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Network is a network of the National Association of Community Legal Centres (NACLC). The Network is made up of people from community legal centres across Australia with an interest in legal issues affecting LGBTI people.

The LGBTI Network welcomes the introduction of this bill and supports marriage equality for all couples. This submission will cover the following areas:

- Discrimination against Same Sex couples
- Sanctity of Marriage
- Changing Nature of Marriage
- Overseas Marriage
- Transgender People
- Intersex People

Discrimination against Same Sex couples

In 2007, the Australian Human Rights Commission produced the report *Same Sex Same Entitlements*, which looked at financial and work related discrimination against same sex couples and their children.<sup>1</sup> Following on from this, Parliament passed a number of bills in 2008 that changed the law to provide equality for all de facto couples in areas including superannuation, taxation, Medicare and social security.

The LGBTI Network welcomed the introduction of these bills. For many years, same sex couples have experienced discrimination and uncertainty when dealing with the legal system. However, many people in same sex relationships had their Centrelink benefits reduced as a result of these reforms.

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<sup>1</sup> Available at:

[http://www.humanrights.gov.au/human\\_rights/samesex/index.html](http://www.humanrights.gov.au/human_rights/samesex/index.html)

While welcoming the 2008 reforms, many of our clients have raised concerns that marriage was not included. This has led to a degree of cynicism amongst some community members, that the Australian Government was willing to recognise their relationship in order to reduce their Centrelink benefits, but was not willing to recognise their relationship as a marriage.

#### *Case study*

Dave and Carlos are an older couple who have been together for about forty years. Dave has suffered a lot of discrimination because of his sexuality. He has been arrested and charged by the police for being gay, and been assaulted by the police as well. Carlos was fired from a number of jobs because of his sexuality, and he had no legal recourse at the time.

Dave and Carlos are glad that Australia has come a long way in recognising the human rights of same sex couples. Their aged pensions were significantly reduced as a result of the 2008 law reforms, but they understand that this is a result of the law becoming equal.

However, they are upset that the government has amended a number of discriminatory laws, except the marriage laws. They feel like the government is willing to recognise their relationship when it is a question of reducing their Centrelink payments, but that it won't recognise the relationship when they want to get married. They feel that this is very unfair.

In the spirit of the 2008 changes to the law, we believe that marriage should be available to all couples equally. There is still discrimination in Australian society against same sex couples. The fact that the law does not allow same sex couples to legally marry fosters this discrimination, as it entrenches this inequality within legislation and legitimises it.

An example of this discrimination is that in NSW, de facto couples have been recognised as 'person responsible' since 1999. Despite this, community legal centres have received a number of inquiries from clients who have experienced problems of recognition of their relationship from hospitals and doctors.

Although the law has provided for equality for ten years, these problems continue to exist. Allowing same sex couples to be able to marry will assist in society viewing their relationships as equal to opposite sex relationships.

#### Sanctity of Marriage

As a network of community legal centres, we see a variety of clients who have a range of different legal problems. While opponents of same sex marriage talk about the sanctity of marriage in a heterosexual union, we have many clients whose experience of marriage is not as a sanctified institution, including:

- sexual abuse of children within the family unit;
- domestic violence;
- separated couples whose marriage has so irretrievably broken down that they are unconcerned about the divorce proceedings, and are solely focused on the distribution of property.

Additionally, we note the divorce lists at the Federal Magistrates Court, where an uncontested divorce is granted in less than three minutes, the parties can apply online and do not need to attend the hearing.

We would submit that this illustrates that marriage is not a sanctified institution within Australian society, but is a legal contract that parties enter into. As a legal contract, we believe that this should be available to all couples.

### Changing nature of Marriage

The nature of marriage, divorce and families has changed over time. Prior to 1975, a couple wishing to divorce in Australia had to show some grounds on which one party was at fault. These grounds could include adultery, drunkenness, abandonment and cruelty. This was changed so that there is only one ground for divorce, being irretrievable breakdown of marriage.

Under NSW criminal law, sexual assault within marriage was only considered a crime in 1989. Gay male sex in NSW was considered a crime until 1984, and the age of consent was made equal for all couples in 2003.

As such, marriage and relationship recognition has adapted to changes in societal values. A recent survey has found that 60% of Australians support equal marriage.<sup>2</sup> We believe that the concept of marriage will continue to evolve and grow along with changes in society.

#### *Case study*

Andrew and Lee have been together for twenty-five years. Although their relationship has been the same throughout this period, the legal status of their relationship has changed:

- in the early stage of their relationship, it was illegal for them to have sex with each other;
- in the middle stage of their relationship, they were able to have sex but did not have any legal rights with respect to their relationship;
- their relationship is now recognised as a de facto relationship.

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<sup>2</sup> Available at:

<http://www.australianmarriageequality.com/Galaxy200906.pdf>

## Overseas marriage

Section 88EA of the Marriage Act, inserted in 2004, expressly provides that marriages solemnised in a foreign country between two men or two women must not be recognised as a marriage in Australia. A definition of 'marriage' was also inserted in Section 5 of the *Marriage Act* in 2004, despite there being no definition of 'marriage' since the enactment of the *Marriage Act* in 1961.

There is a line of High Court authority in constitutional law cases concerning the marriage power under Section 51 of the Constitution, to the effect that what constitutes a marriage is determined by attitudes and trends in society at the relevant time.

In 2003/2004 there was a case before the Family Court at Melbourne concerning two same sex couples who married overseas. They sought a declaration of validity of marriage. Section 88EA of the *Marriage Act* did not exist at the time the case commenced. The Commonwealth Attorney General was granted leave to intervene in the case. At the time, Section 88D provided that marriages validly entered into under the local law of a foreign country shall be recognised as valid in Australia. The Application was withdrawn after Section 88EA was enacted, because the amendments to the *Marriage Act* meant the case probably would not succeed, and the Applicants were therefore at a risk of an adverse costs order.

Australia is a party to the Convention on Celebration and Recognition of the Validity of Marriages signed at the Hague on 14 March 1978. Article 9 of the Convention provides that all Contracting States (parties to the Convention) shall recognise foreign marriages validly entered into in their locality. However, Article 14 of the Convention provides "A Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy."

By creating a definition of 'marriage' as between man and woman only, it does not appear that Australia has breached any article of the Convention. However, by refusing to recognise foreign same sex marriages, it is possible that Australia is in breach of Article 9 and Article 10 may not permit the refusal to recognise foreign same sex marriages.

It is a matter of whether same sex marriage is "manifestly incompatible with [our government's] public policy." While it might be incompatible, it is not clear that it is manifestly so. This also raises questions as to how public policy is determined. Public surveys indicate that most Australians are not opposed to same sex marriage. Same sex relationships are otherwise recognised in each state and territory in these ways:

- with respect to presumptions of parentage applying to lesbian couples who have children by artificial conception procedures;
- surrogacy laws in the ACT and WA having application to same sex couples;
- state based law concerning financial settlements arising out of the breakdown of same sex relationships.

This indicates that state and territory governments recognise that same sex de facto relationships get the same treatment as opposite sex de facto relationships. With the conferring upon the Commonwealth the power to deal with de facto relationships, including same sex relationships, under the *Family Law Act*, financial settlements arising out of the breakdown of same sex de facto relationships are dealt with using the same principles as in marriage cases. All issues arising out of the breakdown of same sex relationships (parenting and financial) are dealt with in the Family Court/Federal Magistrates Court. Victoria, Tasmania and the ACT have introduced relationship registers.

All of this would suggest there is a recognition of the status of same sex de facto relationships and families arising out of such relationships, and they now legislatively receive the same treatment as marriages upon the breakdown of such relationships. In these circumstances, it is arguable that recognition of same sex marriages is not manifestly incompatible with the government's public policy concerning same sex relationships, and therefore foreign same sex marriages should be recognised in Australia.

### Transgender people

While debates around equal marriage are often framed in terms of lesbian and gay couples, there is a significant impact of unequal marriage laws on couples where one or both members are transgender.

We note the Family Court decision of *Re Kevin*, in which the full bench of the court considered the issue of marriage and transgender people.<sup>3</sup> This matter involved a transgender man who was seeking a declaration that his marriage to a woman was valid. In this decision, it was determined that all relevant factors had to be considered when determining a person's legal sex, including their "biological, psychological and physical characteristics at the time of the marriage".<sup>4</sup>

We also note the 2007 decision of *Abrams v Minister for Foreign Affairs and Trade* also considered the issue of legal sex.<sup>5</sup> This matter involved a transgender woman who married her female partner while she still had her male birth certificate. In this matter, the Tribunal accepted that Ms Abrams was a woman, and that she should be issued a female passport, despite the fact that she was married to a woman and could not change her birth certificate.

These two decisions outline the difficulties that transgender people can face in getting married. A transgender person can marry someone of the opposite sex, although it can be disputed whether they are considered to be really 'male' or 'female' by Australian law.

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<sup>3</sup> *In Re Kevin (Validity of Marriage of a Transsexual)* [2001] FamCA 1074  
<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2001/1074.html>

<sup>4</sup> *Re Kevin*, at paragraph 329.

<sup>5</sup> *Abrams and Minister for Foreign Affairs and Trade* [2007] AATA 1816  
<http://www.austlii.edu.au/au/cases/cth/AATA/2007/1816.html>

We have received a number of inquiries from transgender people who are unable to change the legal record of their sex because they wish to remain married to their partner. They are unable to get divorced, because they cannot state that their marriage has irretrievably broken down. The effect of this is that the transgender person is forced to retain their original birth certificate, and cannot be legally recognised in their true gender.

#### *Case study*

Anne and Mario are a couple who have been married for 25 years. Mario has decided to affirm her gender and has changed her name to Maria. Maria has completed sex affirmation surgery and lives as a woman.

Anne and Maria's relationship has stayed strong and they are still very much a couple. However, under state law, Maria cannot change the gender recorded on her birth certificate because she is married. When she asks the Registry of Births Deaths and Marriages why this is, she is told that it is because Australia does not recognise same sex marriage.

For her own safety, Maria would like to change her birth certificate. However, she does not want to get divorced. She cannot truthfully complete the divorce papers, which require that the marriage has irretrievably broken down.

#### Intersex people

We support the submission to this Inquiry from Organisation Intersex Internationale (OII) Australia. OII defines intersex people as:

*People who, as individuals, have genetic, hormonal and physical features that may be thought to be typical of both male and female at once.*

Australian marriage law currently only recognises two sexes, male and female. As such, the current definition of marriage poses problems for intersex people. While an intersex person's birth certificate may state that they are 'male' or 'female', this may not be an accurate representation of their sex. The sex of an intersex child may be incorrectly identified at birth.

Additionally, we note that in Victoria, it is possible for a birth records for an intersex person to indicate 'indeterminate – also known as intersex' as the sex. An intersex person can also carry a passport that states 'X' as their sex. For a person in this position, it creates difficulties as this person is unable to marry anybody.

*Case Study*

Lucia is an intersex person. She was identified as male on her birth certificate, however her body later developed female characteristics. She has applied to the Registry of Births Deaths and Marriages, and has had her birth certificate amended so that it states 'indeterminate – also known as intersex'. She identifies as an intersex woman.

Lucia has been in a relationship with Andrew for two years. She is not sure how the law will approach them getting married. Her birth certificate used to say 'male' and now says 'indeterminate', and she has a female name.

The LGBTI Network is pleased to see the issues of equal marriage being discussed in the public arena, and supports the bill.

Please contact Yasmin Hunter if there is anything else you would like to discuss.

Yours faithfully,

Yasmin Hunter  
On behalf of the LGBTI Network