Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

ILGA'S SUPPORT OF THE GREENS SAME-SEX MARRIAGE BILL

To Committee Secretary

Since its inception in 1978 the International Gay and Lesbian Association (ILGA) has thrived with 670 member organisations, from over 110 countries around the world. It is the only LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) organisation to have constituent members in every continent. ILGA has Economic and Social Council (ECOSOC) status through its European branch and regularly advocates at the United Nations.

ILGA played a significant role in advocating for countries to sign on to the recent statement launched at the United Nations to extend existing United Nations human rights to the international LGBTI community all around the world. Recently ILGA and one of its member organisations, the Naz foundation in India, witnessed the culmination of a 20 year joint campaign to legalise homosexuality in India. It was also instrumental in the successful campaign against the criminalisation of homosexuality in Burundi. Globally ILGA and its campaigns to achieve an equal age of consent, legalise same-sex marriage and decriminalise homosexuality have made great strides for the average LGBTI person, no matter where they live in the world.

ILGA is concerned when countries such as Australia persist with anti-gay laws such as the same-sex marriage ban. Positive changes in some countries, including Australia, make it even more important to recognise that for LGBTI sexuality five (5) countries have the death penalty, seventy-nine (79) countries declare it to be illegal and sixteen (16) countries have an unequal age of consent, whilst only seven (7) countries have same-sex marriage, ten (10) countries have same-sex adoption and only ten (10) countries have constitutional protections for LGBTI sexuality.***** The United Nations is presently taking its first steps in recognizing sexuality as a human right.

ILGA is becoming increasingly concerned over Australian reluctance to formally recognise same-sex relations. Australia's stance encourages many countries with appalling human rights records to treat their LGBTI populations even worse. Various representations have been made to ILGA concerning various Australian laws, including the federal same-sex marriage laws, but also the issues concerning the unequal age of consent, especially in Queensland. At its next international board meeting ILGA is considering whether Australia needs to be mentioned in its report on those countries which institutionally persecute LGBTI people. Australia signed the United Nations statement on recognising human rights for LGBTI people, but needs to follow through with legislation that puts this mandate into practice.

The ILGA has voted to support the Greens Senator, Sarah Hanson-Young, in her proposed Australian federal same-sex marriage bill. This organisation has called on all the major parties, including the Labor and Liberal

---

***** Daniel Ottosson, *2009 State Sponsored Homophobia Report* – A World Survey of the Laws Prohibiting Same-Sex Activity between Consenting Adults (2009) <http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf>.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

parties, to support its passage into legislation. ILGA has prioritised the legislation as one of its main targets in its newly launched campaign to combat homophobic laws in the Australia, New Zealand and Pacific Island (ANZAPI) region.

Lyn Morgain, ILGA ANZAPI (Victoria) co-representative, said "This bill is an important step in taking Australia closer to true equality for LGBTI folk. The current Federal government's position on this issue has exposed Australia to the risk of being perceived by fair-minded people across the world as a poor performer on basic human rights for LGBTI people. This offers a key opportunity to remedy this travesty."

Joleen Brown Mataele, ILGA ANZAPI (Tonga) co-representative, said "It is truly a concern that everyone should have equality in all, it would be a milestone for all other Pacific Islands if Australia will take the lead on this bill. Some opponents of gay marriage fear that by allowing same-sex couples to marry, it will lessen the validity of heterosexual marriage. They say marriage is union with the purpose of creating and raising children. They argue that children fare better in a household headed by a man and a woman. Which I do not agree, I have raised 5 adopted children and I have never had any problem at all with my community, my family, my church and friends and have I lived my life as a transgender for 46 years and I loved every minute of it."

The following is an analysis of the legitimacy of Australia's ban on same-sex marriage put into perspective with the trend in international jurisprudence. We hope to demonstrate that the Greens' bill[1] will bring Australia into line with a general consensus recognising the rights of LGBTI people and same-sex couples.

I. LEGISLATIVE AIM

A) Legitimate Purpose

The legislature needs to be aware that in fulfilling its role it is mindful of the duty to make only laws that have a rational purpose to be accountable to the electorate and the legal system they are a part of. *Yau*[2] stated that a legitimate legislative aim can never be justified simply by the action of legislating.

The statutory elements of the marriage ban[3] do not prescribe a punishment for disobeying the definition when it is breached. It could be argued that the same-sex marriage ban legislation is therefore only nomenclature and does not infringe any rights. However its disuse is irrelevant. *Dudgeon*[4] stated that the fact that a Northern Ireland law criminalising homosexuality had not been enforced by authorities only further indicated that there was not a 'pressing social need', such as harm to the public.

---

1 *Marriage Equality Amendment Bill 2009* (Cth).
2 *Secretary For Justice V Yau Yuk Lung* [2007] 3 HKLRD 903 CFA at [33 (Bokhary PJ), 5 (facts)].
3 **The statutory elements of the marriage ban whilst not being one statute will be referred to as the 'same-sex marriage ban legislation' in this document for simplicity.**
4 *Dudgeon v United Kingdom, Judgement of 22 October 1981, Series A, No45* (1982) 4 EHRR 149.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

B) Parallel Recognition

The Federal government pledged to introduce legislation to end financial discrimination against same-sex couples based on Human Rights and Equal Opportunity Commission (HREOC)[5] recommendations[6] (recently enacted)[7]. The reforms instigate de facto relationship rights comparable to those of marriage, for example heterosexual 'prenuptial' rights.[8] Penny Wong[9] said, when articulating the government's opposition to a Greens' same-sex marriage reform attempt[10], that labour was committed to removing all discrimination against same-sex couples, but they still regarded marriage as a union between a man and a woman and thereby supported the current marriage definition. The issue is whether this is still unequal treatment.

Kerrigan (first instance)[11] stated, when validating the Connecticut same-sex marriage ban, that civil unions with comparable rights were constitutional, as the access to rights that had been previously monopolised in marriage was the important legal issue, not the name of the rights packages, as no legal harm can be done by a mere rhetorical separation.[12] However, *Kerrigan (on appeal)*[13] stated, when initially overturning this decision, that it was not a nomenclature argument, as civil unions produced an inferior status, even with the same legal rights. Similarly, *Re Opinions*[14] stated, when advising on whether a bill to establish a Massachusetts civil union scheme, passed in response to *Goodridge*'s[15] invalidation of the same-sex marriage ban legislation, that the legislation, whilst affording all of the rights and responsibilities of marriage, would violate the constitution's equal protection and due process clauses.

Re Marriage[16], when invalidating the California same-sex marriage ban, in spite of a comparable civil unions scheme, rejected the argument[17] that it was only the withholding of the denotation of marriage that mattered, stating

---

5 Human Rights and Equal Opportunity Commission (HREOC) <http://www.hreoc.gov.au/>.
6 Patricia Karvelas, "100 Laws Ignore Same-Sex Couples" *Australian* (Sydney, Australia) 01 March 2008 <http://www.theaustralian.news.com.au/story/0,25197,23300057-5013871,00.html>.
7 "Same-sex superannuation discrimination laws reformed" Herald Sun (Melbourne) 24 November 2008 <http://www.news.com.au/heraldsun/story/0,21985,24700371-661,00.html>.
8 Caroline Marcus, 'Prenuptial Rights for Same-Sex, Unmarried', Sydney Morning Herald (Sydney), 19 October 2008 < http://www.smh.com.au/news/national/prenuptial-rights-for-sasamesex-unmarried/2008/10/18/1223750399550.html>.
9 Commonwealth, Parliamentary Debates, Senate, 12 November 2008, p113 - 6:46 pm (Penny Wong, Australian Labor Party, Minister for Climate Change and Water) <http://www.openaustralia.org/senate/?id=2008-11-12.159.1>.
10 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Reform) Bill 2008* (Cth).
11 *Kerrigan v Commissioner of Public Health* [2008] SC17716 at Ch6A [Connecticut Supreme Court].
12 *Kerrigan v State* [2006] 49 Conn.Supp. 644 at 657; 909 A.2d 89 at 97 (Conn.Super., 2006) [Connecticut Superior Court of New Haven].
13 Kerrigan v State [2006] 49 Conn.Supp. 644 at 656-665 - Ch6A-C; 909 A.2d 89 at 96-100 - Ch6A-C (Conn.Supp., 2006).
14 *In re Opinions of the Justices to the Senate* [2004] 440 Mass. 1201 at Ch3-4(1205-1210); 802 N.E.2d 565 at Ch3-4(569-572) (Mass. 2004).
15 *Goodridge v Department of Public Health* [2003] 440 Mass. 309; 798 N.E.2d 941 (Mass., 2003).
16 *In re Marriage Cases* [2008] 43 Cal.4th 757 at 830-831 (George CJ - majority) - Ch4B; 183 P.3d 384 at 435-436 (George CJ - majority) - Ch4B; 76 Cal.Rptr.3d 683 at 742-743 (George CJ - majority) - Ch4B (Cal. 2008).
17 *In re Marriage Cases* [2008] 43 Cal.4th 757 at 782 (George CJ - majority); 183 P.3d 384 at 400 (George CJ - majority); 76 Cal.Rptr.3d 683 at 701 (George CJ - majority) (Cal. 2008).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

that the distinction impacted heavily on same-sex couples' right to equal respect and dignity.

The exclusion of same-sex couples from marriage causes real harm, regardless of the associated equal rights. The state endorsement of a second-class status for same-sex couples encourages disproportionate private sanction. *Varnum*[18] stated that a same-sex marriage ban infringed a number of tangible as well as intangible rights, including social stigma for same-sex couples. Additionally, it leaves the door open for legislation to be implemented distinguishing same-sex couples from heterosexual couples.

C) Legislative Intention

The structure of the legislation is not as important as the purpose. The targeting of LGBTI people needs to be assessed in the legislation's application and whether its purpose is designed to cause detriment to LGBTI people.

In *S.L. v Austria*[19], legislation that sanctioned homosexual activity more severely than heterosexual activity for 14-19 year olds was actionable simply by the legislation's existence and the fear of exposure, sanctioning, intimate questioning and stigmatisation for entering into a sexual relationship with an adult partner. In *Limon*[20], the Kansas 'Romeo & Juliet' legislation singling out homosexual sex for harsher punishment was unconstitutional discrimination, even thought it applied to males and females equally, because the intention was to discriminate against homosexuality. *Lawrence*[21] stated that, if the benefit denied is so closely correlated with homosexuality, then the law targets homosexuals.

D) Rights Removal

The differentiation in classification between same-sex marriage (as de facto relationships) and heterosexual marriages significantly impacts on the lives of same-sex couples. The assurance was that same-sex couples in de facto relationships would obtain the same rights as heterosexual married couples by equalising de facto relationship rights to those of marriage. However, Queensland has recently equalised adoption for de facto couples, but specifically excludes same-sex de facto relationships.[22] In Utah the legal definition of marriage has been used to legitimise ordinarily prohibited discrimination, e.g. preventing a newspaper announcement of a homosexual relationship.[23]

---

18 *Varnum v Brien* [2007] CV5956 at 22-27 [Iowa District Court for Polk County].
19 *Case of S.L. v Austria (App.39392/98; App.39829/98), Judgment of 09 January 2003.*
20 *State v. Limon* [2005] 280 Kan. 275, 122 P.3d 22, Kan., October 21, 2005 (NO. 85,898).
21 *Lawrence v Texas* [2003] 539 U.S. 558 at 583; 123 S.Ct. 2472 at 2486 (U.S., 2003).
22 "Bligh's Gay Adoption Stance 'Confusing'", *ABC News* (New South Wales, Australia),19 June 2007 <http://www.abc.net.au/news/stories/2009/08/19/2660324.htm>.
23 Jennifer Dobner, "Utah Paper Rejects Same-Sex Wedding Announcement", *Associated Press* through *Google News* [United States], 29 January 2009.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Lindell[24] argues that both the United States[25] and Australia[26] have a mandate for "full faith and credit" to same-sex relation recognition, even if the state strictly prohibits it. This would have been practical for the ACT civil union legislation and is even applicable to the relationship register set up in some states. However, the United States does not seem to have taken this approach. Rhode Island's refusal to recognise same-sex marriage meant that it also could not grant divorce for neighbouring Massachusetts same-sex marriages. Rhode Island residents who have married in Massachusetts are now potentially married forever, since Rhode Island does not recognise gay marriage and Massachusetts limits divorces to residents.[27]

There is a large amount of legal uncertainty when same-sex marriage recognition is withheld. When New York banned same-sex marriage, the Massachusetts Supreme Court ruled that marriages occurring before the ban were to be legally recognised.[28] A same-sex marriage ban also impacts on heterosexuals. The first constitutional amendment to ban same-sex marriage in Arizona would have stripped away the right of de facto couples, if it had not failed.[29] When the Iowa constitution was amended to ban same-sex marriage, it also affected the ability of de facto heterosexual couples to utilise many state laws, including domestic violence measures.[30]

E) Discrimination

Because some aspects of the same-sex marriage ban do not mention homosexuals, and the there appears to be no sanctionable action mandated against those that enter same-sex relations, it could be argued by some not to be discriminatory to homosexuals, however there is a large amount of case law to suggest that this is not the case.

---

[24] Lindell, Geoffrey, "Constutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia" [2008] 30(1) *Sydney Law Review* 27 at Ch5.

[25] *United States Constitution*, art IV § 1.

[26] *Australian Constitution 1901*, ss118 & 51(xxv).

[27] Sue Horton, 'The Next Same-Sex Challenge: Divorce', Los Angeles Times (California) <http://articles.latimes.com/2008/jul/25/local/me-gaydivorce25>.

[28] "170 New Yorkers' Gay Marriages Upheld In Mass." USA Today (United States) 16 May 2007 <http://www.usatoday.com/news/nation/2007-05-16-gay-marriage_N.htm?csp=34>.

[29] Daniel Scarpinato, "Poll: Az Voters Thought Gay Marriage Ban Unfair", *Arizona Daily Star* (Arizona), 20 January 2007 <http://www.azfamily.com/news/local/stories/KTVKLNews20061121_poll.11140be0.html>.

[30] Eric Resnick, "Appeals Court: Marriage Ban Trumps Home Violence Law", *Gay Peoples Chronicle* (Cleveland, United States) 31 March 2006 <http://www.gaypeopleschronicle.com/stories06/march/0331064.htm>.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Loving[31], when invalidating a law prohibiting interracial marriages, rejected the notion that a statute's mere equal application to both races is enough to prevent it being used for invidious discrimination. United States same-sex marriage cases make extensive comparisons to *Loving*. *Quilter*[32], when validating New Zealand's marriage ban, in *obiter dicta* (Latin: remarks in passing) stated that a ban on same-sex marriage was not discrimination, however, whilst it discussed American cases at length, *Loving*[33] was noticeably not mentioned. In *Hernadez*[34], Smith J distanced the issue of same-sex marriage from "sham equality" in Loving, stating that the same-sex marriage limitation does not place men and women in different classes. In *Goodridge*[35], Spina J (minority) stated, when unsuccessfully arguing against removing the Massachusetts same-sex marriage ban, that the marriage legislation does not discriminate on gender, given that the law is applied equally to both sexes, arguing that *Loving* emphasised the right to marry not the right to choose who to marry and, due to the separation of powers principle, novel rights could not be created where none existed.

In *Hernandez*, Smith J[36] stated that men and women are treated alike, since they are permitted to marry the opposite sex, and this is not the same as *Loving*, since anti-miscegenation laws are substantively anti-black legislation. However, Kaye J[37] (minority) stated this rationalisation should be rejected, as the allowances of homosexuals to enter into marriages with opposite sex partners, to whom they have an innate attraction, does not cure the infringement of the right of individuals to marry.

Dean[38] stated that Washington D.C.'s same-sex marriage ban had no invidious discrimination motivating the ban, since it is a statute designed to meet the needs of heterosexuals and it applies to both genders since both men and woman are prohibited from same-sex marriage and furthermore applied to both heterosexuals and homosexuals, regardless of homosexuality. However, *Kerrigan*[39] found the arguments about same-sex marriage bans not being discriminatory, particularly the one in Dean (above) not persuasive.

F) Conclusion

The legislation has a discriminatory impact on same-sex couples and therefore there is a legitimate state interest justifying this legislation, if it is to be retained.

---

31 *Loving v Virginia* [1967] 388 U.S. 1 at 8-9 (Warren J), 87 S.Ct. 1817 at 1821-1822 (Warren J); (U.S.Va. 1967).
32 Quilter v Attorney General [1998] 1 NZLR 523 at 560-563 (Keith J), 526 (Thomas J) & 527 (Gault J).
33 *Loving v Virginia* [1967] 388 U.S. 1 at 8-9 (Warren J), 87 S.Ct. 1817 at 1821-1822 (Warren J); (U.S.Va. 1967).
34 *Hernandez v. Robles* [2006] 7 N.Y.3d 338 at 364 (Smith J - majority) – Ch4B, 855 N.E.2d 1 at 6-7 (Smith J - majority) – Ch4B (NY, 2006).
35 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 351-355 (Spina J - Minority); 798 N.E.2d 941 at 974-979 (Spina J - minority) (Mass., 2003).
36 *Hernandez v Robles* [2006] 7 N.Y.3d 338 at 364 (Smith J - majority)–Ch4B, 855 N.E.2d 1 at 6-7 (Smith J - majority) – Ch4B [NY, 2006].
37 *Hernandez v Robles* [2006] 7 N.Y.3d 338 at 389-390 (Kaye CJ - minority); 855 N.E.2d 1 at 25 (Kaye CJ - minority) (N.Y., 2006).
38 *Dean v. District of Columbia* [1995] 653 A.2d 307 at 362-364 (Steadman AJ) (D.C., 1995).
39 *Kerrigan v Commissioner of Public Health* [2008] SC17716 at Ch6D [Connecticut Supreme Court].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

II. LEGITIMATE STATE INTERESTS

A) Morality

Lawrence[40] stated, when decriminalising homosexuality in the United States, that the court has never held that moral disapproval, without any other asserted state interest, is a sufficient rationale to justify a law that discriminates. *Naz*[41] stated, when decriminalising homosexuality in India, that public morality was not a sufficient state interest to justify discrimination of a minority based on an immutable characteristic. *Norris*[42] stated that public moral shock could never be a sufficiently pressing social need to restrict private consenting adult behaviour. *McCoskar*[43] stated, when decriminalising homosexuality in Fiji, that morals are not grounds to restrict private sexual activity and relationship building, as those freedoms were the basis of any democratic country.

Dudgeon[44] stated, when overturning Northern Ireland legislation criminalising homosexual sexuality activity that, since private sexual activity involved the most intimate aspect of private life, there must exist serious reasons for public authority interferences. The protection of health and morals did not legitimise the infringement, even though members of the public who regard homosexuality as immoral may be shocked, offended or disturbed. *Lawrence*[45] stated, when overturning laws against homosexual sexual activity, that a prohibition of a practice is not justifiable merely because the governing majority considers it immoral.

B) Tradition

Prior to winning government, the Labor Party's reported position against same-sex marriage was based largely on the preservation of tradition.[46] *Bowers*[47], when validating a Georgia anti-sodomy statute, claimed that it was justified, because of a centuries-old tradition of moral condemnation, however, statutes like this have long since been repealed.

---

40 *Lawrence v Texas* [2003] 539 U.S. 558 [O'Connor], 123 S.Ct. 2472 [O'Connor] (U.S. Tex. 2003).
41 *Naz Foundation v Delhi Government* [2009] WP(C)7455/2001 at [75-87 (Muralidhar J)].
42 *Norris v Ireland, Judgement of 26 October 1988, Series A, No142* (1991) 13 EHRR 186 at 61-62 [Report].
Norris v Ireland, Judgement of 26 October 1988, Series A, No142 (1991) 13 EHRR 186 at 46 [Merits and Satisfaction].
43 *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 at 78-87.
44 *Dudgeon v United Kingdom, Judgement of 22 October 1981, Series A, No 45* (1982) 4 EHRR 149.
45 *Lawrence v Texas* [2003] 539 U.S. 558 at 577, 123 S.Ct. 2472 at 2483 (U.S. Tex. 2003).
46 Tony Wright and Brendan Nicholson, "Outrage at Rudd's Same-Sex Marriage Stance", The Age (Melbourne), 24 October 2008 <http://www.theage.com.au/news/national/gay-groups-outraged-at-labor-leaders-samesex-marriage-stance/2007/10/23/1192941066209.html>.
47 *Bowers v. Hardwick* [1986] 478 U.S. 186 at 192 (U.S., 1986).
as discussed in
Lawrence v Texas [2003] 539 U.S. 558 at 571, 123 S.Ct. 2472 at 2480 (U.S. Tex. 2003).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Varnum[48] stated, when invalidating the Iowa same-sex marriage ban, that past non-acceptance (polite for moral disapproval) has never been an accepted legitimate state interest, and that an additional underlying state interest must accompany it. In *Hernandez*[49], Graffeo J[50] (minority) stated that justifying discrimination by tradition or moral disapproval is preferential treatment for its own sake. *Goodridge*[51] stated that same-sex couples should not be denied access, because marriage is such a traditionally vital institution.

Kerrigan[52] (first instance) stated that relationship rights were no longer monopolised in marriage, as they had traditionally been, and therefore there was no constitutional claim for marriage, as same-sex couples could access those equal legal rights through civil unions and consequently suffer no legal harm. *Kerrigan*[53] (on appeal) rejected this argument, thereby invalidating the Connecticut same-sex marriage ban law, stating that same-sex couples should be permitted to marry, as historical and cultural entrenching of an understanding of marriage is simply the inadequate state interest of moral disapproval in the guise of nostalgia for past traditions.

C) Procreation

These arguments revolve around a same-sex couple's inability to procreate. In *Gooridge*[54], Cordy J (minority)[55] stated that procreation, not commitment. is the traditional basis for marriage, because the function of marriage is to regulate procreation.[56] This reasoning echoes the heavily criticised[57] past biological imperative theories, e.g. Lasch[58], who emphasised that procreation and child-raising are more critical to marriage than a "love complex", as only recognition of these duties creates marriage stability, and Rossi[59], arguing that, from a socio-biological perspective, each sex's biological characteristics mandated prioritising child-raising over relationships.

---

48 *Varnum v Brien* (Case No. CV5965) [Iowa District Court for Polk County] *at* 51-53.
49 *Hernandez v Robles* [2006] 7 N.Y.3d 338 at 373 (Graffeo J); 855 N.E.2d 1 at 13-14 (Gaffeo J) (NY, 2006) [06 July 2006].
50 The majority whilst finding that there was a legitimate interest in procreation to validate the New York marriage ban legislation did not address tradition as a valid state interest.
51 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 312 [1]; 798 N.E.2d 941 at 948 [1] (Mass., 2003).
52 *Kerrigan v State* [2006] 49 Conn.Supp. 644 at 656-660; 909 A.2d 89 at 96-98 (Conn.Super., 2006) [12 July 2006].
53 *Kerrigan et al. v. Commissioner of Public Health et al.* [2008] SC 17716 [Connecticut Supreme Court] at Ch6E.
54 *Goodridge v Department of Public Health* [2003] 440 Mass. 309; 798 N.E.2d 941 (Mass., 2003).
55 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 392 [Footnote34]; 798 N.E.2d 941 at 1003 [Footnote34] (Mass., 2003).
56 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 368, 381 & 392; 389 N.E.2d 941 at 987-988, 995 & 1003 (Mass., 2003).
57 Barbara Harris, "Recent Work on the History of the Family: A Review Article" (1976) 3 *Feminist Studies* No ¾ (Spring/Summer), 159-172 at 159-170.
58 Christopher Lasch, *Haven in a Heartless World* (1977) xiv-xvii at 37-43.
59 Alice Rossi, "A Biological Perspective on Parenting" (1977) 106 *Daedalus* No2 at 1-33, 12-18 & 22-25.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Historically it has been stated, in *Lawrence*[60], when overturning the ban on sexual conduct and more recently in *Varnum*[61], when invalidating the Iowa same-sex marriage ban, that excluding homosexuals on procreation grounds was grossly under-inclusive as often heterosexual couples have no procreative involvement, sometimes being sterile, infertile or elderly. In *Hernadez*[62], Smith J[63] stated, whilst validating the New York same-sex marriage ban, that same-sex couple's childbearing incapability is relevant and that the over-inclusivity was necessary since excluding non-childbearing heterosexuals would be too intrusive and arbitrary. Graffeo J[64] went further, limiting the fundamental marriage right compulsorily to procreation. *Dean*[65] stated that marriage is only a fundamental right because procreation and childrearing are necessary to the human race's survival. In contrast, in *Hernadez*[66], Kaye CJ (in minority) stated that, whilst there were legitimate unutilised ways of encouraging procreation through incentives and non-marital sex disincentives, excluding same-sex marriage was not rational. *Goodridge*[67] stated that procreation is no longer the primary purpose or requirement of marriage and furthermore reproductive technologies compensate for an inability to conceive.

Goodridge[68] rejected the idea of an optimal childbearing setting and also rejected the notion that state resources would be wasted on less successful child-raising environments. *Re Marriage*[69] stated that sociologically there is no devaluation to heterosexual couples by allowing same-sex marriages, however, significant harm is caused to same-sex families due to implied illegitimacy and segregation. *Varnum*[70] stated, when invalidating the Iowa same-sex marriage ban, that, whilst responsible procreation is a legitimate state interest, it is not related to the exclusion of

---

60 *Lawrence v Texas* [2003] 539 U.S. at 605; 123 S.Ct. at 2498 (U.S., 2003).
61 *Varnum v Brien* [2007] CV5965 at 59 [Iowa District Court for Polk County].
62 *Hernandez v Robles* [2006] 7 N.Y.3d 338; 855 N.E.2d 1 (NY, 2006).
63 *Hernandez v Robles* [2006] 7 N.Y.3d 338 at 365 (Smith J - majority) - Ch3B(1); 855 N.E.2d 1 at 7 (Smith J - majority) - Ch3B(1) (N.Y., 2006).
64 *Hernandez v Robles* [2006]7 N.Y.3d 338 at 370-373 (Gaffeo J - majority) - Ch4A, 855 N.E.2d 1 at 11-13 (Gaffeo J -majority) - Ch4A (N.Y., 2006).
65 *Dean v District of Columbia* [1995] 653 A.2d 307 at 362-364 (Steadman AJ) (D.C., 1995).
66 *Hernandez v Robles* [2006] 7 N.Y.3d 338 at 391-394 (Kaye CJ - minority) - Ch3B(1); 855 N.E.2d 1 at 26-27 (Kaye CJ - minority) - Ch3B(1) (NY, 2006).
67 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 331-333 (Marshall CJ) [32-33]; 798 N.E.2d 941 at 961-963 (Marshall CJ) [32-33] (Mass., 2003).
68 *Goodridge v Department of Public Health* [2003] 440 Mass. 309 at 333-338 (Marshall CJ) [34-36]; 798 N.E.2d 941 at 962 (Marshall CJ) [34-36] (Mass., 2003).
69 *Kerrigan et al. v Commissioner of Public Health et al.* [2008] SC 17716 at Ch6E [Connecticut Supreme Court].
70 *Varnum v Brien* [2007] CV5965 at 53-61 [Iowa District Court for Polk County].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

same-sex couples. Similarly in Australia *Kevin*[71] stated that procreation is no longer seen as the main purpose of marriage and that there has been a societal shift from procreation to companionship as the basis of marriage.

D) Public Health and Harm

Harm is a legitimate state interest. The EU case of *Lasky*[72] stated that not all private sexual activity can be classed as private, for example the inclusion of physical harm legitimised state intervention. However, the harm caused by a same-sex marriage ban far outweighs any arguments against its legalisation. Solidity of same-sex relationships protects LGBTI people from AIDS, as they are then far less likely to engage in casual and risky sexual practices, therefore laws that prohibit LGBTI relationships and behaviours tend to make them more susceptible to disease transmission. *Toonen*[73] stated, when examining Tasmania's anti-gay laws, that the criminalisation of homosexual practices cannot be considered a 'reasonable' or 'proportionate' means to achieve the aim of AIDS/HIV prevention. Furthermore they tend to impede public health programmes by driving underground many of the people at the risk of infection, thereby running counter to the implementation of effective HIV/AIDS prevention education programmes. Both *Naz* (India)[74] and *Toonen* (UN)[75] stated that there was no evidence to demonstrate a causal connection between criminal sanctions and preventing the spread of HIV/AIDS. Indeed the evidence appeared to demonstrate that it hampered such efforts, and therefore it could not be considered a reasonable or proportionate measure.

A legitimate public health state interest cannot be linked to the same-sex marriage ban legislation, therefore the legislation cannot be justified as proportionate in its infringement of LGBTI couples' rights. Furthermore, the same-sex marriage bans endangerment of LGBTI health would lead to consideration of whether this legislation is an impermissible infringement of the LGBTI person's right to life.

---

71 *In re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 at [37-38].
72 *Lasky, Jaggard and Brown v United Kingdom (Apps. 21627/93, 21826/93 and 21974/93), Judgement of 19 February 1997* (1997) 24 EHRR 39.
73 *Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992* (1994) at [8.5]
74 *Naz Foundation v Government of NCT of Delhi* [2009] WP(C) No. 7455/2001 at [61 – 74].
75 *Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992* (1994) at [8.5].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

E) Suitable Parents

One concern is that the inclusion of same-sex couples in marriage would encourage more same-sex child-raising and whether a same-sex family is the best environment to raise children. In fact same-sex families raise children regardless of marriage laws and the concerns over same-sex couple's parental ability appears disproportionate, when considering the standards laid down for heterosexual marriage.

Australia recognises heterosexual overseas polygamous, incestuous and under-age marriage for the purpose of divorce, however, same-sex marriages are not recognised, even for divorce. Furthermore, heterosexual paedophiles, heterosexual mass-murderers and heterosexuals with several previous marriage failures are allowed marriage, but not homosexuals, no matter what their qualifications as parents are.

Varnum[76] stated that same-sex couples make equally good parents, compared with heterosexual parents and are even more suited than step-parents to raise children. *Varnum*[77] stated that the classification based on exclusion of same-sex couples is both under-inclusive (because it does not exclude groups such as heterosexual child abusers, heterosexual sexual predators, heterosexual parents neglecting children and heterosexual violent felons) and over-inclusive (because it prohibits same-sex couples that have no intention of having children from marrying).

F) Religious Objection

Varnum[78] stated that the unspoken state interest of religious policy is not a legitimate state interest, as the marriage ban tackles secular constitutional marriage not religious marriage, due to the separation of church and state. Australia has a similar religious freedom provision preventing a religious belief being imposed.

G) Conclusion

Recent cases[79] have stated that there are no legitimate state interests in preventing same-sex couples marrying. ILGA urges the committee, and the parliament, to consider whether there is a genuine legislative need for retaining a same-sex marriage ban.

III. CONSTITUTIONAL MARRIAGE LIMITS

A) Constitutional Legislative Power

There has been much argument concerning whether the federal government can legislate for same-sex marriage.

---

[76] Varnum v Brien (07-1499) [2009] at 54-59 [Iowa Surpeme Court].
[77] Varnum v Brien (07-1499) [2009] at 54-59 [Iowa Surpeme Court].
[78] Varnum v Brien (07-1499) [2009] at 63-67 [Iowa Surpeme Court].
[79] Varnum v Brien (CV5965) [2007] at 63-67 [Iowa Surpeme Court] & Varnum v Brien (07-1499) [2009] at 63-67 [Iowa Surpeme Court].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

The legislative ability of Federal Parliament on issues of marriage and the family derives from the constitutional legitimacy of marriage, divorce and incidental powers of the Federal Parliament contained in the Constitution.[80] When the legislature enacted the same-sex marriage ban and subsequent legislation excluding LGBTI couples from marriage, they did this through the same marriage power.

In Australia a legislative power distribution system exists where the Commonwealth's legislative power is limited by the prescribed boundaries of "marriage"[81]. In *AG(Vic)*[82] Dixon CJ stated that, because the legislative power limits are expressed in one word, "marriage", its boundaries should be generously interpreted.

Lindell[83] argues, referring to Canada, where there exists a similar Federal power head division legislating for marriage, that, if the constitutional power does not include same-sex marriage, then the Federal government could not legislate for its recognition, however, it conversely would have the incidental power to prohibit it by covering the field. In *Kevin/Jennifer*[84] it was stated that the High Court has never considered the meaning of 'marriage' in the Constitution in any detail, even though a number of judges expressed views in *obiter dicta*.

McClennon[85] recently argued that marriage was understood at federation to be between a man and a woman and therefore the government could not legislate for same-sex marriage. Brennan J[86] has stated that the *Hyde* definition applies and therefore it is beyond the powers of the Commonwealth Parliament to legislate regarding any other form of marriage, not even allowing legislation for children born to heterosexual couples outside marriage. However the High Court has significantly softened its view on this position. The High Court, in *Work Coices*[87], even recently went out of its way to reject the 'originalist' approach, which stated that the constitutional interpretation is restricted by interpretation in the past. It is unlikely that the High Court would find that same-sex marriage is outside the scope of the marriage power.

---

80 *Australian Constitution 1901,* ss 51(xxi), (xxii) & (xxxix).
81 *Australian Constitution 1901*, s51xxi.
82 *Attorney-General (Vic) v Commonwealth (Marriage Act case)* [1962] HCA 37; (1962) 107 CLR 529 at [2 (Dixon CJ)].
83 Lindell, Geoffrey, "Constutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia" [2008] *SydLRev* 2; [2008] 30(1) *Sydney Law Review* 27.
84 *Kevin and Jennifer* (2003) 30 Fam LR 1 at [22–24].
85 Robert McClelland, "Statement to the Australian Labor National Conference, Sydney", 1 August 2009.
86 a) *In the Marriage of Cormick* (1984) 156 CLR 170, 182.
b) *Re F; Ex parte F* (1986) 161 CLR 376, 399.
c) *Fisher v Fisher* (1986) 161 CLR 438, 455–6.
d) *R v L* (1991) 174 CLR 379, 392.
87 *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

B) Unknown Same-sex marriage concept

It could well be argued that the legal concept of homosexuals and same-sex marriage was not known in the law, and that, if same-sex marriage was to be excluded, it would have been an articulated ban and, regardless of marriage's history. The contemporary meaning of marriage today includes being able to legislate on same-sex marriage. Glesson[88] argued that, whilst buggery had been an offence in the law, the concept of 'homosexuals' as a class of people was unknown in the law until the Wolfenden instigated English decriminalisation of sodomy in 1967.

It is important to point out that, whilst *Hyde*[89] came out in 1869, it was only after *Bethel*[90] in 1878 that the common law position started adopting an unwarranted conservative interpretation restricting marriage to a particular nuclear family model. Poster[91] argues that there were numerous family forms before the last decades of the 19th century and that only in the mid 20th did the isolated "3rd stage proletarian" nuclear family predominate. Since these alternative family models were known, one would expect the constitutional founders to have been explicit in the exclusion of all other family forms beside the nuclear family, if this was their intention. In *Work Choices*[92] the High Court majority stated that it is dangerous to rely on what the framers intended at the time with regard to corporations law, as the concept was only in its infancy when the constitution was being drafted, with one of the most important cases only decided in 1897[93].

The fact is that the constitutional founders did not know they were excluding same-sex marriages, because, when they inserted the word 'marriage', they did not know that marriages apart from heterosexual marriage would be an issue, therefore they only placed the word 'marriage' so that contemporary meanings of marriage could be incorporated.

C) Statutorily Redefining Constitutional Power Disallowed

The United States examples demonstrate that the enshrining of marriage as a heterosexual union needs to be constitutionally stated. However, if it was argued that Australia did know same-sex marriage was a possibility, then a constitutional ban would have been appropriate to prevent recognition. Until that occurs the courts are unlikely to see same-sex marriage as outside the federal government's power to legislate.

The Federal Parliament enacted a bill[94] that enshrined the Hyde definition into the *Marriage Act*[95]. The issue is

---

88 Kate Gleeson, "Discipline, Punishment and the Homosexual in Law" [2007] 28 *Liverpool Law Review* 327-347.
89 *Hyde v Hyde* (1865-69) L.R. 1 P. & D. 130 [1861-73] All E.R. Rep. 175; 1866 WL 8213.
90 *In Re Bethe: Bethel v Hildyard* (1988) 38 Ch.D. 220.
91 Mark Poster, *Critical Theory of the Family* (1978), Ch 7 at 166-205.
92 *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1.
93 *Salomon v Salomon & Co Ltd* [1897] AC 22.
94 *Marriage Amendment Bill 2004* (Cth).
95 *Marriage Act 1961* (Cth), s5(1) (definition of Marriage) and reiterated in *Marriage Act 1961 (Cth)*, s46(1).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

whether that statutory definition really does dictate societal perception of marriage or whether the constitutional definition now encompasses same-sex marriage. Brennan J in *Cormack*[96] stated that the scope of the marriage power conferred by section 51(xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be within that conception.

In *Wakim*[97], McHugh J stated that, whilst in 1901 'marriage' has conformed to the Hyde definition, the level of abstraction now means that the contemporary meaning of 'marriage' is a union between "two people" rather than "one man and one woman" and therefore same-sex marriage is now within the power to legislate. In *AG(Vic) v Cth*[98], Windeyer J stated that the Commonwealth legislative competency would extend beyond the limits of the historical Christian definition of marriage to laws dealing with polygamy.

D) Societal Meaning Evolution

Work Choices[99] rejected the notion of progressivism, in which the constitution is re-reformulated to include contemporary notions of jurisprudence, either from domestic or international sources. However, the High Court routinely employs the technique of connotation and denotation to new concepts of changing definitions. The constitutional concept of 'service marks' was interpreted to include concepts comparable to 'service marks' which were unknown in 1900, including trade marks[100] and copyright[101]. "Postal, telegraphic and telephonic" services was adapted to include radio[102] and television[103]. *Grain Pool*[104] stated that the notion that the boundaries of the power conferred by s51(xviii) are not to be ascertained solely by identifying a 1900 definition.

In *re Same-Sex Marriage*[105] when the Canadian Supreme Court, which has a similar marriage power division between its commonwealth and provinces, considered the scope of their marriage and divorce power, they argued that the concept of marriage was not frozen in time in 1867 and a marriage definition that reflected modern life would include same-sex marriage recognition.

---

96 *In the Marriage of Cormick* [1984] 156 CLR 170; 59 ALJR 151; 56 ALR 245; 9 Fam LR 880; FLC 91-554; WL 439936 at [1-5 (Brennan J)].
97 *Re: Wakim; ex parte McNally* (1999) 198 CLR 511 at 553.
98 *Attorney-General (Vic) v Commonwealth ("Marriage Act case")* [1962] HCA 37; (1962) 107 CLR 529 at [4 (Windeyer J)].
99 *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1.
100 *Davis v Commonwealth* [1988] HCA 63; (1988) 166 CLR 79.
101 *Grain Pool of WA v Commonwealth* [2000] HCA 14; 202 CLR 479; 170 ALR 111; 74 ALJR 648.
102 *R v Brislan* [1935] HCA 78; (1935) 54 CLR 262.
103 *Jones v Commonwealth (No 2)* [1965] HCA 6; (1965) 112 CLR 206.
104 *Grain Pool of WA v Commonwealth* [2000] HCA 14; 202 CLR 479; 170 ALR 111; 74 ALJR 648 at [23 (Gleeson CJ, Gaudron, Mchugh, Gummow, Hayne & Callinan JJ)].
105 *re Same-Sex Marriage* [2004] 3 S.C.R. 698, (2004) SCC 79 at Q1.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Kevin/Jennifer[106] stated that marriage is undefined in the constitution, other than within the meaning of the word marriage. *Kevin/Jennifer*[107] stated, when validating a postoperative female-to-male transsexual marriage[108] with a biological woman, that the contemporary definition of the word 'man' is used to determine statute meaning, not an assumed 1961 enactment definition[109]. However, *Scafe*[110] stated that the marriage of a pre-operative male-to-female transsexual in a lesbian relationship was not comparable to a marriage-like relationship for social security purposes[111], because the marriage act definition and intent confines the meaning of "marriage".

Varnum[112] stated that, whilst marriage is a fundamental right, it has evolved over time, in the legislature and the courts, to meet the changing needs of society. Most dictionaries have expanded their accepted definition of marriage to include same-sex marriage, or alternatively recognise a gender-neutral definition of marriage[113]: -

General-Neutral Definition

Encarta Dictionary[114]

> *"**1. legal relationship between spouses:** a legally recognized relationship, established by a civil or religious ceremony, between two people who intend to live together as sexual and domestic partners.*
>
> ***2. specific marriage relationship:** a married relationship between two people, or a somebody's relationship with his or her spouse"*

Same-Sex Marriage Specific Definition

Merriam-Webster Dictionary[115]

> ***"1.** the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law*
>
> ***2.** the state of being united to a person of the same sex in a relationship like that of a traditional marriage <same-sex* marriage*>"*

---

[106] *Attorney General (Commonwealth) and "Kevin and Jennifer" and the Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (decided 21 February 2003).
[107] *In re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 (12 October 2001).
[108] *In re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 (12 October 2001) at [132-136 (Chisholm J)].
[109] However it was made it clear that the decision was not deciding whether same-sex marriages were legitimate.
[110] *Scafe and Anor v Secretary, Department of Employment and Workplace Relations* [2008] AATA 104.
[111] *Social Security Act 1991* (Cth), s 4(2).
[112] *Varnum v Brien* [2007] CV5965 [Iowa District Court for Polk County] at [96-106].
[113] a) Daniel Redman, "Noah Webster Gives His Blessing", *Slate* (Washington D.C., United States) 7 April 2009 < http://www.slate.com/id/2215628/>.
b) "Gay marriage gets recognition in the dictionary", *USA Today* (United States), 18 March 2009 <http://www.usatoday.com/news/nation/2009-03-18-gay-marriage_N.htm>.
[114] Microsoft, *Encarta 2006* <http://encarta.msn.com/dictionary_/marriage.html>.
[115] *Merriam-Webster Dictionary* <http://www.merriam-webster.com/dictionary/Marriage> at 31 August 2009.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

E) International Reinterpretation

Lawrence[116] stated, when finding unconstitutional a Texas law that prohibited homosexuality, that generally constitutional provisions allow many possibilities to recognise future generational truths for the freedom of every generation.

In India the constitution is regularly reinterpreted to keep pace of contemporary concepts. *Naz*[117] stated that the Indian constitution provisions are to be construed as wide and liberal to anticipate change, for future expansion to handle various crises and thereby avoid fossilisation.

In Canada there also exists a heads of power division for legislating: -

1) Federal parliament – "marriage and divorce"
2) Provincial states - "marriage solemnization".

Re SSM[118] stated, when the Canada's Supreme Court validated Canada's same-sex marriage law, that the marriage definition sets the legislature's power limits. It is restricted by the framer's definition but progressively interpreted to ensure future relevance, including same-sex marriage. Therefore, even though the provinces can legislate for non-marriage relationships and marriage solemnization and the definition impacts on their function, defining marriage resides with the Federal Parliament.[119]

Much the same method of approach to the solution of constitutional questions is adopted by the Judicial Committee of the Privy Council. In *Edwards*[120] Lord Sankey L.C., speaking of the *Canadian Constitution*, said that it "planted in Canada a 'living tree' capable of growth and expansion within its natural limits," and noted with approval Sir *Robert Borden's* statement that, "like all written constitutions it has been subject to development through usage and convention." The Australian Constitution should receive the same "large and liberal interpretation" as that accorded by the Privy Council to the *British North America Act*.[121]

---

[116] *Lawrence v. Texas* [2003] 539 U.S. 558; 123 S.Ct. 2472 at 2484 (Kennedy J)/ [5 (Kennedy J)] (U.S., 2003).
[117] *Naz Foundation v NCT Government of Delhi* [2009] WP(C) 7455/2001 at [114].
[118] *re Same-Sex Marriage* (2004) 246 DLR (4th) 193 especially at 203–207/[16–30].
[119] *In re Same-Sex Marriage* (2004) SCC 79; [2004] 3 SCR 698 at [31-34].
[120] *Edwards v Attorney-General for* Canada (1930) A.C. 124 at 136.
[121] *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan Informant* [1931] HCA 34; (1931) 46 CLR 73 at 2 (Evatt J).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Whilst theorists such as Allan[122] argue that Canada's comparable 'living tree' interpretation is inappropriate for Australia, especially if attempting to go so far as to extrapolate a complete implied Australian bills of rights, Allan/Aroney[123] describes how the Canada's 'living tree' theory, as opposed to a static interpretation of the constitution, ensures that the constitution is constantly evolving and keeping pace with civilisation.

IV. LEGISLATIVE RESTRICTION

A) Inadequate Ban

There has been a general acceptance that the marriage definition restricts marriage to a man and a woman. In *Scafe*[124] the marriage of a pre-operative male to a female transsexual who lived in a lesbian relationship was not even a marriage-like relationship for the purpose of social security[125], because of the marriage act definition. In *Cth v HEROC*[126]**,** Moore J, in the federal court, stated that marriage rights were not accessible for same-sex couples, because a common sense interpretation of the *Marriage Act*[127] would mean marriages of males to females and vice versa, and in his opinion, the definition cannot be satisfied in relation to same-sex couples.

However, a number of cases that look at the issue of the marriage definition at best restrict themselves to the legislative definition within the legislation boundaries. *Kevin/Jennifer*[128] discussed the meaning of 'marriage' within the *Marriage Act*[129] but did not discuss the constitutional meaning of marriage and even then its analysis was only investigating redefining marriage to include post-operative transsexual persons.[130]

It could well be argued that the definition of marriage in the marriage legislation does not go beyond the bounds of the legislation, thereby not affecting other references to marriage in other legislation, and even not conflicting with new marriage definitions in other legislation. It would certainly not affect the constitution. The definition of marriage in the marriage legislation does not redefine marriage in the constitution, which should possess a definition comparable to what society perceives as marriage.

---

122 James Allan, 'Do The Right Thing' Judging? The High Court of Australia in Al-Kateb" [2005] *University of Queensland Law Journal* 1 at ch3.
123 James Allan & Nicholas Aroney, "An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism" [2008] *Sydney Law Review* 15 at ch2.
124 *Scafe and Anor; Secretary, Department of Employment and Workplace Relations* [2008] AATA 104.
125 *Social Security Act 1991* (Cth), s 4(2).
126 *Commonwealth of Australia v Human Rights & Equal Opportunity Commission & Anor (includes corrigendum dated 2 June 1998)* [1998] FCA 138 at [17-24].
127 *At this stage the definition was only in the following section: -*
a) Marriage Act 1961 (Cth), s46(1).
b) *Marriage Act 1961 (Cth)*, s69(2) [removed].
128 *Kevin and Jennifer* (2003) 30 Fam LR 1 at 17–24, 26–31 (Nicholson CJ, Ellis and Brown JJ).
129 *Marriage ACT 1961* (Cth), s5(1) (definition of Marriage) and reiterated in *Marriage Act 1961 (Cth)*, s46(1).
130 *Kevin and Jennifer* (2003) 30 Fam LR 1 at 64 (Nicholson CJ, Ellis and Brown JJ).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Exclusion from a definition is not a ban. Legislation requires sanctions for conduct that it treats as prohibited behaviour. Whilst there have been many examples of LGBTI people being treated detrimentally because of their second-class status, this is an inadequate prohibition, as it is not foreseeable or predictable. Furthermore, if it is not a ban, then common law and state statute could easily take up the option of legislating same-sex marriage, if the federal government does not.

B) Common Law

Since it could be argued that the definition of marriage is not a ban of same-sex marriage, and just a definition only acting within the marriage legislation, same-sex marriage is conceivably still covered in common law. *Hyde*[131] stated, when refusing to award a divorce to a potentially polygamous marriage in Utah, that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others". This has been quoted as the common law meaning of marriage.

Poulter[132] describes how the Hyde case was misinterpreted by subsequent cases like *Bethel*[133] to make it a total de-recognition of marriage not conforming to this definition. Poulter[134] argues that the Hyde definition has been largely overridden by common law and statute in England and has only lingering remnants which should be removed. In the English Court of Appeal decision of *Bellinger*[135] Thorpe LJ stated that marriage has been redefined as a gender-neutral contract between two parties, which is regulated by the state both in its formation and in its termination by divorce, and from this status a variety of entitlements, benefits and obligations are obtained.

In many cases marriage is described as a contract between the participants. *Bellinger*[136] stated that it is a contract for which the parties elect, but which is regulated by the state, both in its formation and in its termination, because it is also a status, providing a variety of entitlements, benefits and obligations. Therefore if statute does not recognise same-sex marriage, the common law could, at the very worse, give recognition as a contract.

---

131 *Hyde v Hyde and Woodmansee* (1886) L.R. 1P. & D. 130 at 133.
132 Sebastian Poulter, "Hyde v Hyde - A reappraisal" [1976] 25(3) *International and Comparative Law Quarterly* 475 at 492-494.
133 *In Re Bethe: Bethel v Hildyard* (1988) 38 Ch.D. 220.
134 a) Sebastian Poulter, "The Definition of Marriage in English Law" [1979] 42 *Modern Law Review* 410.
b) Sebastian Poulter, "Hyde v Hyde - A reappraisal" [1976] 25(3) *International and Comparative Law Quarterly* 475.
135 *Bellinger* [2002] Fam 150, 184.
136 *Bellinger* [2002] Fam 150, 184.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

C) State Power to Legislate

The absence of a competent ban can mean that states can either legislate for same-sex marriage or may even have same-sex marriage legal without knowing. Based on the fact that definitions are only relevant inside the statute they exist then, if the marriage statute only deals with 'heterosexual marriage' (referred to as 'marriage' within the now 'heterosexual marriage' statute), then it is possible to have parallel same-sex marriage legislation at the Commonwealth level or parallel same-sex marriage at the State level due to its relinquished power.

Under the constitution[137] the Commonwealth Parliament may make laws for the government of any territory surrendered by any state or territory and accepted by the Commonwealth or otherwise acquired by the Commonwealth. By inference the reverse is also true in that the powers relinquished by the Commonwealth automatically become state powers. The constitution[138] gives the state every power unless it is by this Constitution exclusively vested in the Commonwealth Parliament or withdrawn from the State Parliament. Commonwealth enactment of the marriage definition is clearly an indication that the Commonwealth is relinquishing its power to legislate on same-sex marriage (provided it ever had the power) and is giving this legislative power to the states under the constitution[139].

States have taken up the ability to legislate in the area of heterosexual marriage, where the Commonwealth has chosen not to exclusively cover the field. The area of marriage registration is legislated for in every state and territory, except Queensland[140], referencing the restriction of the commonwealth marriage definition. In taking up legislating in this area of marriage, states and territories are restricted by the Commonwealth restrictions imposed enforcing anti-discriminatory principles and therefore should not be just referencing the heterosexual marriage definition for the registrable marriages.

Whilst it is little more than statute in the commonwealth parliament these anti-discriminatory statues have a primary quality over conflicting state and territory legislation. Such rights provisions have been enacted to maintain Australia's commitment to international treaties using the external affairs power[141].

---

[137] *Australian Constitution 1901*, s122.
[138] *Australian Constitution 1901*, s107.
[139] *Australian Constitution 1901*, s109.
[140] Births, Deaths And Marriages Registration Act 2003 (Qld), s25.
[141] Australian Constitution, s51(xxix).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

a) Sex Discrimination[142] **–** In *McBain*[143] the court overruled the Victorian state ban on single women's access to 'In Vitro Fertilisation Treatment' (IVF)[144] due to conflict with the federal anti-discrimination legislation[145].

b) Sexuality Discrimination[146] **-** In *Croome*[147] it was found that Commonwealth legislation[148] could overturn Tasmanian state legislation outlawing homosexuality[149].

Queensland marriage registration legislation[150] is the only state registration statute that does not restrict itself to the commonwealth marriage definition. The common law definition of marriage could even now allow same-sex marriage to be registered in this state.

V INFRINGED RIGHTS

There are a number of rights that a same-sex marriage ban infringes, however the two which we are focussing are the ones which have a particular relevance to Australia i.e. the right of privacy and the freedom of religion.

VI RIGHT OF PRIVACY

A) International Law

McCoskar[151] stated that there was a definite trend towards the decriminalisation of consensual homosexual intimacy and there was nothing in any open democratic society which would suggest otherwise.[152] The Commonwealth using its 'external affairs' power partially implemented[153] the section of the International Covenant on Civil and Political Rights (ICCPR) dealing with arbitrary interference of privacy[154]. It was well understood that it would nullify any law decriminalising homosexuality, but also extend to other laws affecting consensual sexual relations, such as ages of consent[155]

---

142 *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, opened for signature 18 December 1979, 1249 UNTS 13 (entry into force 3 September 1981).
143 *McBain v State of Victoria* [2000] FCA 1009 (28 July 2000).
144 *Infertility Treatment Act 1995* (Vic), s8.
145 *Sex Discrimination Act 1984* (Cth), s22.
146 *International Covenant on Civil & Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).
147 *Rodney Croome & Anor v The State of Tasmania* [1997] HCA 5; (1997) 191 CLR 119 (26 February 1997).
148 *Human Rights (Sexual Conduct) Act 1994* (Cth).
149 *Criminal Code Act 1924* (Tas).
150 Births, Deaths And Marriages Registration Act 2003 (Qld), s25.
151 *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 at Ch 9 (Privacy) [17].
152 The Fijian constitution mandates that the interpretations of other jurisdiction internationally be examined when making a verdict.
153 *Human Rights (Sexual Conduct*) *Bill 1994* (Cth) .
154 *International Covenant on Civil & Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).
155 Margo Kingston, "Courts to Test Limits of Sexual Privacy Bill", *Sydney Morning Herald* (New South Wales, Australia), 16 September 1994 <http://www.caah.org/articles/articles/campaigns/decriminalisation/index1994a.htm>.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

Dudgeon[156], found an infringement of the European Human Rights Convention's (EHRC) privacy provision[157] in the criminalisation of private consensual homosexual practice, rejecting the argument[158] that the privacy right excluded unmarried couples and homosexual activity. On numerous occasions in international jurisprudence courts have found that privacy protections of intimate sexual relations require extremely compelling state interests if they are to be infringed. Limitations on this right are given the narrowest of appreciation margins.

B) Recognition Without Specific Constitutional Articulation

Australia has no bill of rights and cases like *Kruger*[159] have severely limited the rights that can be implied. However, certain privacy-based rights have been implied by the constitution. The High Court has implied the right of freedom of expression and association. These are freedoms closely associated with the right of privacy. Whilst the High Court has been reluctant to recognise a general right of privacy, it is not inconceivable that a right of marriage could be extrapolated from a general implied right of privacy, if it is not already obtained from the right of privacy that has been previously granted to same-sex couples.

In the United States there is not an explicitly stated privacy right but it has been interpreted by the Supreme Court. *Roe*[160] stated that, whilst not explicitly stated, the right of privacy does exist in the constitution and that it is rooted in the first (freedom of religion, expression and assembly), fourth and fifth amendments. This was reiterated in judgements like *Re Marriage*[161], when finding unconstitutional the California same-sex marriage ban, which stated that a right of privacy was not present in the California constitution, however there was an implied guarantee of the right to privacy and freedom of intimate association.

India does not have a specific privacy provision in its constitution but the right of privacy has been spelt out by the Indian Supreme Court. *Kharak*[162] stated that the right of privacy, whilst not expressly referred to, could be extrapolated from rights such as freedom of expression[163], movement[164] and liberty[165]. In *Gobind*[166], where the law

---

156 *Dudgeon v United Kingdom, Judgment of 22 October 1981, Series A, No 45* (1982) 4 EHRR 149 at [40-41].
157 *Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, Rome 4.XI 1950 (entered into force on 4 November 1950), Article 8.
158 *Dudgeon v United Kingdom, Judgment of 22 October 1981, Series A, No 45* (1982) 4 EHRR 149 at [22-23 (minority, Walsh J)].
159 *Kruger v Commonwealth of Australia; Bray v Commonwealth of Australia (Stolen Generations case)* (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991; [1997] 13 Leg Rep 2; [1997] HCA 27.
160 *Roe v Wade* [1973] 410 U.S. 113; 93 S.Ct. 705 (U.S.Tex., 1973).
161 *In re Marriage Cases*, 43 Cal.4th 757 at 809-810 (George CJ - majority) – Ch4; 183 P.3d 384 at 419-420 (George CJ - majority) – Ch4; 76 Cal.Rptr.3d 683 at 724-725 (George CJ - majority) – Ch4 (Cal. 2008) [15 May 2008].
162 *Kharak Singh v The State of U.P.* (1964) 1 SCR 332.
163 *Indian Constitution*, s19(1)(a).
164 *Indian Constitution*, s19(1)(d).
165 *Indian Constitution*, s21.
166 *Gobind v State of M.P.* (1975) 2 SCC 148 at [20].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

as to privacy developed, the court favourably used the United States' extrapolation of a privacy right, stating that there was no doubt that the constitution founders wanted to ensure conditions favourable to the pursuit of happiness and therefore must have deemed to have conferred upon the individual a sphere where he should be let alone by the government.

C) Relationship Protection

Marriage is, in some respect, a public legal declaration about the state of a relationship. However, the right of privacy is not hampered by a private act becoming public. European Union cases make this distinction. *ADT*[167] invalidated sanctions based on a videotape made of consensual private sexual acts without physical harm to the participants. *Moran*[168] and *ADT*[169] have clarified that videotaping private sexual activity does not make it public. Whether an action is done in private is, therefore, not an indicator of its protection by the right of privacy. Additionally a right of privacy does not protect some conduct, even if done in private, if a legitimate state interest is involved. The European case of *Lasky*[170] stated that not all private sexual activity can be classed as private, for example the inclusion of physical harm legitimised state intervention.

The right of privacy's protection is more applicable to intimate decisions of private life, rather than secrecy of the action. *McCoskar*[171] stated, when using international law principles to overturn a Fijian law that criminalised homosexual (but not heterosexual) sex in public, that the right of privacy internationally was a protection that extended beyond intrusion into private life to the freedom of relationships generally from criminal or community sanction. United States cases make this distinction.

Initially in *Olmstead*[172] it was just a right to be left alone. In some cases like *Holm*[173] it has been argued not to extend to same-sex marriage. However, in *Griswald*[174], it was a protected interest that placed an emphasis on the marriage relationship and the marital bedroom and in *Eisenstadt*[175] it even extended to protect unmarried

---

[167] *ADT v United Kingdom (App. 35765/97), Judgment of 31 July 2000* (2001) 31 EHRR 33.
[168] *L. Moran, 'Laskey v. The United Kingdom: Learning the Limits of Privacy'* (1998) 61 MLR 77 at 273.
[169] *ADT v United Kingdom (App. 35765/97), Judgment of 31 July 2000* (2001) 31 EHRR 33.
[170] *Laskey, Jaggard & Brown v United Kingdom (Apps. 21627/93, 21826/9 & 21974/93), Judgment of 19 February 1997* (1997) 24 EHRR 39 Supporting the house of lords decision of *Brown* [1994] 1 AC 212 at 231-275 [House of Lords].
[171] *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 at 71-74.
[172] *Olmstead v United States*, 277 US 438 (1928).
[173] *State v Holm* [2006] 137 P.3d 726 (Utah, 2006) at 757-759 (Nehring J – concurring minority)/[127-129 (Nehring J – concurring minority)].
[174] *Griswold v State of Connecticut* [1965] 381 US 470.
[175] *Eisenstadt v Baired* [1972] 405 US 438 (1972).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

relationships. Blackburn J, In *Bowers*[176], stated that privacy was not a right to be left alone in private space, but a freedom to make fundamental decisions and expressions in intimate relationships, without outside community interference. *Bernstein*[177] stated that privacy protected the inner sanctum of the person, such as family life, shielded from community rights. *Slaton*[178] stated that sexual intimacy is central to family life and is core to private intimacy. This is the same in India. *Rajagopal*[179] stated that, through the right to privacy, a citizen has a right to safeguard the privacy of their family, marriage, procreation, motherhood, child bearing and education, among many other matters.

D) Unprotected Relationships

Older cases such as *Bowers*[180] argued that privacy is not a protection that extended to sodomy. Indeed in *Lawrence*[181] Scalia J, in minority, apocalyptically forecast that homosexual relationship legitimisation through constitutional protection would legitimise a multitude of cultural taboos, including polygamy, currently targeted for criminal sanction. However, history has demonstrated that, in countries where homosexuality and same-sex marriage have been legalised, there has been no reverse in the prohibitions on incest or polygamy. Additionally there are many cases which make a clear distinction between sodomy and other deviations from traditional nuclear marriage custom.

Freeman[182] demonstrated that privacy historically does not protect incest. Unlike homosexuality, the rights infringement is justified by the legitimate state interest from the harm done to the children, family and society by incest, e.g. inbreeding, destabilisation and coercion of vulnerable family members. *John*[183] stated, when invalidating a law which prevented heterosexuals, but not homosexuals, from engaging in kindred relations, that whilst there was a legitimate state interest of preventing incest, that the restriction should be equally applied to heterosexuals and homosexuals. Cases like *Reynolds*[184] stated that, similarly to incest, the right of privacy does not protect polygamous marriages.

---

[176] *Bowers v Hardwick* [1986] 478 US 186 at 63 (U.S.Ga., 1986).
[177] *Berstein v Besta* [1996] (4) PCLR 499 (cc); [1996] 2 SA 751 (cc) at [67].
[178] *Paris Adult Theatre I v Slaton* [1973] 413 US 49 at 63 (1973).
[179] *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632.
[180] *Bowers v Hardwick* [1986] 478 U.S. 186 at 196-96, 106 S.Ct. at 2846 (U.S.Ga., 1986).
[181] *Lawrence v. Texas* [2003] 539 U.S. 558 at 586, 123 S.Ct. 2472 at 2472, 156 L.Ed.2d 508 (U.S., 2003).
[182] *State v Freeman* [2003] 155 Ohio App.3d 492 at 496-497 (Donofrio J)/[12-18(Donofrio J)], 801 N.E.2d 906 at 908-910(Donofrio J)/[12-18(Donofrio)].
[183] *State v. John M.* [2006] 94 Conn.App. 667, 894 A.2d 376 (Conn.App., 2006).
[184] *Reynolds v. U.S.* [1878] 98 U.S. 145, 8 Otto 145, 1878 WL 18416, 25 L.Ed. 244 (U.S.Utah, 1878).

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

E) Right of Marriage

The right of marriage is based on a number of other rights and has even been classed in some constitutions as a separate distinguishable right. *In Re Marriage*[185], it was stated that a right of privacy was not present in the California constitution, however there was an implied guarantee of the right to privacy and freedom of intimate association. Australia has no right to marry specifically stated in the constitution. However, certain privacy based rights have been implied by the constitution. The High Court has implied the right of freedom of expression and association. These are freedoms closely associated with the right of privacy. Whilst the High Court has been reluctant to recognise a right of privacy, it is not inconceivable that a right of marriage could be extrapolated from those implied rights.

The fact that same-sex couples have traditionally not been included in marriage is not a hurdle to recognition of their right to marry. *Kerrigan*[186] stated that the historical exclusion of same-sex couples from marriage did not mean that marriage was not a right. *Re Marriage*[187] stated that same-sex couples do have marriage as a right, despite a tradition of non-recognition, because the underlying basis of the marriage right is personal autonomy of relationships, and sexual orientation is not a basis for withholding that legal right.

In *Goodridge*[188] whilst the minority[189] argued that marriage is a fundamentally heterosexual right and therefore not transferable to same-sex couples, the majority[190] stated that the right of marriage is a fundamental right of privacy, which accounts for the substantive justification required for interference. *Re Marriage*[191] stated that prior cases had used a broad and neutral interpretation, concentrating on the freedom of choice of a marriage right not limited by class or history.

E) Conclusion

The right of privacy has been demonstrated to constantly overturn laws that infringe the basic rights of relationship identity. The legislature should make sure that it lives up to its obligations under international law and respect the right of privacy of same-sex couples by removing the same-sex marriage ban.

---

[185] *In re Marriage Cases*, 43 Cal.4th 757 at 809-810 (George CJ - majority) – Ch4; 183 P.3d 384 at 419-420 (George CJ - majority) – Ch4; 76 Cal.Rptr.3d 683 at 724-725 (George CJ - majority) – Ch4 (Cal. 2008) [15 May 2008].

[186] *Kerrigan et. al. v. Commissioner of Public Health et. al.* (SC17716) at Ch8 (Palmer J).

[187] *In re Marriage Cases*, 43 Cal.4th 757 at 781-782 (George CJ - majority) – Ch5D; 183 P.3d 384 at 399-400 (George CJ - majority) – Ch5D; 76 Cal.Rptr.3d 683 at 700-701 (George CJ - majority) – Ch5D (Cal. 2008) [15 May 2008].

[188] *Goodridge v. Department of Public Health*, 440 Mass. 309; 798 N.E.2d 941 (Mass., 2003) [18 November 2003].

[189] *Goodridge v. Department of Public Health*, 440 Mass. 309 at 365 (Cordy J) ; 798 N.E.2d 941 at 983-984 (Cordy J) [32-33] (Mass., 2003) [18 November 2003].

[190] *Goodridge v. Department of Public Health*, 440 Mass. 309 at 326-327 (Marshall CJ) [15-19] & 345 (Greaney J.); 798 N.E.2d 941 at 957-958 (Marshall CJ) [15-19] & 970 (Greaney J.) (Mass., 2003) [18 November 2003].

[191] *In re Marriage Cases*, 43 Cal.4th 757 at 811-813 (George CJ - majority) – Ch4A; 183 P.3d 384 at 420-422 (George CJ - majority) – Ch4A; 76 Cal.Rptr.3d 683 at 724-727 (George CJ - majority) – Ch4A (Cal. 2008) [15 May 2008].

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

VII. RELIGIOUS FREEDOM

A) Minority Religious Belief Protection

Goodridge[192] stated that civil marriage is a wholly secular institution, which means that parliament regulates its form, and it was noted that, in Massachusetts, a religious ceremony has never been required to validate marriage. *Kerrigan*[193] stated that only civil marriage is being discussed, therefore religious objections cannot play a role. Religious autonomy is not threatened with same-sex marriage legalisation, as opposed religions would not be forced to perform them.

Re Marriage[194] stated that affording same-sex couples the opportunity to marry would not impinge upon religious freedom[195], as no religion would be required to change its religious policies or practices. *Re SSM*[196] found that the enacted Canadian same-sex marriage did not breach the religious freedom provision[197] as it protected religious officials from being compelled to perform those marriages, and even in some provinces civil celebrants were awarded exemptions[198].

Marriage defined by the law is not religious marriage. In *Kevin*[199] it was stressed that marriage has been given a monogamous Christian perspective, but is a civil concept using the Hyde definition. However Murphy[200] argues that the Hyde definition is becoming more redundant as marriage becomes more secular. Poulter[201] argues that the Hyde definition is an example of Victorian religious bigotry. Therefore it would be easy to argue that the marriage ban based on this definition is forcing a particular religious restriction on marriage.

Therefore, same-sex marriage legislation can be framed as wide as possible and would not infringe religious freedom, however, when legal marriage restricts a religion from operating, such as those that support same-sex marriage, it would be a potential breach. There is a religious freedom provision in the constitution which acts as a 'negative' right[202] preventing the Commonwealth legislating to infringe the right. Whilst there has not been a

---

192 *Goodridge v. Department of Public Health* [2003] 440 Mass. 309 at 321 & 325-326 (Marshall CJ) [7 & 15]; 798 N.E.2d 941 at 954 & 957 (Marshall CJ) [7 & 15] (Mass., 2003).
193 *Kerrigan et. al. v. Commissioner of Public Health et. al.* [2008] (SC17716) at Ch6E (Palmer J).
194 *In re Marriage Cases* [2008] 43 Cal.4th 757 at 854-855/[20] (George CJ - majority) – Ch5D; 183 P.3d 384 at 451-452/[20] (George CJ - majority) – Ch5D; 76 Cal.Rptr.3d 683 at 763/[20] (George CJ - majority) – Ch5D (Cal. 2008).
195 *California Constitution*, art. I, § 4.
196 *Re Same-Sex Marriage* [2004] SCC 79; [2004] 3 S.C.R. 698.
197 *Canadian Charter of Rights and Freedoms*, 2(a).
198 "Gay, Christian Activists Question Same-Sex Marriage Bill", *CBS News* (Ontario, Canada) 06 March 2007, <http://www.cbc.ca/canada/new-brunswick/story/2007/03/06/nb-bill37.html>.
199 *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94.
200 John Murphy, "The Recognition of Same-Sex Families in Britain" (2002) 16 *International Journal of Law, Policy and Family* 181 at Ch3A.
201 Sebastian Poulter, "Hyde v Hyde: A Reappraisal" (1976) 25 *The International and Comparative Law Quarterly* 3 at 485.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

[202] Negative rights, to prevent the government from legislating in a certain ways, as apposed to positive rights, that proactively mandate the government to act in certain areas to fulfil minimum standards.

successful claim using the religious freedom provision, cases demonstrate how it could work to prevent a same-sex marriage ban and what restrictions this protection would have.

Religious freedom is a 'negative' right against legislation, not its administration[203], but is not an exemption from the law, which is indiscriminately applied. However, it does protect minority religions from purposefully discriminatory legislation. Religious freedom must be balanced with the interest of ordered government, mainly national security, including evading military duty within conscription[204], and groups subversive to the war efforts[205]. This is comparable to the United States system, which tests for validity of legislation discriminating against a class of people to determine if the legislation is a legitimate state interest.

The religious policy of some churches should not be an excuse to flout the law. *New Faith Church*[206] stated that making a religious doctrine superior to a nation's law permits every citizen to flout laws. However, the freedom of religion protection could well be argued to over-ride the authority given to the Commonwealth Parliament to legislate for marriage[207]. Therefore, whilst dominant anti-gay religious sentiment should not be allowed to dictate the law, the state should also be wary that the right of religious freedom would protect those whose religious beliefs allow for same-sex marriage.

Baines[208] argues that, whilst the High Court has analysed the scope of freedom of religion, it has not analysed its application. As a result the court has not provided strong guidance on how s116 should be practised in such issues as homosexual marriage and IVF provisions.

---

[203] *Kruger v Commonwealth ("Stolen Generations case")* [1997] HCA 27; (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991 at [86 (Toohey J)] [31 July 1997].

[204] *Krygger v Williams* [1912] HCA 65; (1912)15 CLR 366 (15 October 1912).

[205] *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116 (14 June 1943).

[206] *Church of New Faith v Commissioner of Pay-Roll Tax (Vic) (Scientology Case)* (1983) 154 CLR 120 at [135 (Mason ACJ and Brennan J)]. **quoting the United States case of** *Reynolds v. U.S.* [1878] 98 U.S. 145; 8 Otto 145; 1878 WL 18416; 25 L.Ed. 244 (U.S.Utah, 1878).

[207] McTiernan J stated in *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116 at 156 (Tiernan J) that s116 imposes a restriction on all the legislative powers of the Parliament. Gibbs J stated in Attorney-*General (Vict.); Ex Rel. Black v The Commonwealth* [1981] HCA 2; (1981) 146 CLR 559 at 10 (Gibbs J) that Parliament cannot pass a law under s51 which conflicts with s116 even thought other section of the constitution were influenced by s51 such as s96 (which is also restricted by s116). Latham CJ stated in *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116 at 123 (Latham CJ) that s116 prevails over and limits all provisions of the constitution which give power to make laws. *Federal Commissioner of Taxation v W.R. Moran Pty. Ltd.* (1939) 63 CLR at 775 stated that 'the powers given by s51 of the constitution are expressly made "subject to the constitution"' are made s116 is not expressly made to be subject to the constitution.

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

[208] Charlotte Baines, "The Church and State Relationship in Australia: The Practice of s116 of the Australian Constitution" [2007] *Australia and New Zealand Law and History E-Journal*, Refereed Paper No 3 at 15.

B) Conclusion

The legislation should not infringe the religious rights of those that do not support same-sex marriage, however, at the same time the freedom of religion protection would undoubtedly protect same-sex couples from any law preventing them from exercising their rights to be recognised as a same-sex marriage.

VIII. CONCLUDING REMARKS

The same-sex marriage ban is contrary to the general consensus in international courts that there is no legitimate state interest for preventing same-sex marriage. Australia has the capacity to legislate for same-sex marriage and should remove the inadequate definition exclusion by supporting the Greens bill[209]. This would bring Australia in line with its commitments to international human rights, as Australia's ban infringes the rights of same-sex couples, especially but not exclusively, the right of privacy and religious freedom. The senate committee should call on the legislature to demonstrate political courage on this issue. The legislature should fulfil its responsibility to protect all its citizens equally and regardless of immutable characteristics. It should not wait for a High Court to intercede to protect the fundamental rights that are being infringed.

SIMON MARGAN
(Sydney, ILGA ANZAPI Region Representative)

Lyn Morgan
Level 8, 225 Bourke St
Melbourne, VIC 3000
NSW, Australia
P +613 9660 3900
F +613 9660 3950
lyn@also.org.au

Simon Margan
6 Crown St
Epping 2121
NSW, Australia
P +614 38 637 037
smargan@bigpond.net.au

Joey Mataele
P.O. Box 783
"Latai Residence"
Halaleva, Nuku'alofa
Kingdom of Tonga
W +676 771 8021
joleenm10@gmail.com

[209] *Greens Marriage Equality Bill 2009* (Cth) Bill.