Submission

Senate Legal and Constitutional Affairs Committee

Inquiry into the

Marriage Equality Amendment Bill 2009

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Introduction:

Firstly, I wish to thank Senator Hanson-Young for putting this Private Member's Bill forward for the consideration of the Australian Federal Parliament and Australian electors. Clearly, her desire is to promote serious and informed public debate about this important issue. It concerns all members of this polity, not least our children and grand-children. I welcome the opportunity of replying to her challenge.

Thank-you also to the Senate Standing Committee for receiving this Submission.

The suggested legislative amendments to the definition of marriage included in the Bill can not be supported. It is noted that the present Government's party platform from the last election gives those who voted for the Labor Party firm grounds for believing that this Bill will be defeated. Nevertheless, we can still expect that there will be positive outcomes from this Parliamentary debate and to advance greater public justice the issues still need to be aired publicly, carefully and positively, and if possible resolved. Many issues are at stake including an accurate understanding of marriage as an institution.

So I am grateful for this opportunity and hope that my submission helps Senators understand why the amendments are wrong in principle and should not be accepted.

Brief Summary

In brief, my position can be captured in these terms: the attempt to attain for a homosexual partnership the legal identification of marriage is a legal error based on an empirical mistake.

In relation to this matter we take note of the many legislative areas which have achieved a much greater measure of justice in the granting of 'entitlements' in recent decades in all kinds of matters that relate to the support given and received in long-term supportive relationships of both a marital and non-marital kind. Indeed, part of the political struggle has been with the unjust administration of such 'entitlements' over many decades that has justified its

approach by an exclusionary appeal to the marriage-bond. The justice that was and is required, requires adequate legal recognition of various kinds of long-term supportive relationships. We might say that the injustice was hitherto justified in terms of relationships in which the person or persons were not involved, rather than by giving due respect to the relationships in which they were engaged in mutual support. That approach, we have come to see, was an unjust administration of entitlements and in many respects it has been, or is in the process of being, overcome. But it has been overcome without it being shown in any way whatsoever that it was the definition of marriage itself which was the root of the injustice. It was not the definition of marriage that was unjust. It was an unjust appeal to marriage to justify an exclusionary approach to entitlements in the administration of justice itself.

Importance of the Debate

That being said, I wish to acknowledge the important *political* service rendered in this debate by 'gay rights' activists who have raised and maintained their concerns over decades. That debate has helped raise questions about the true role of Government and its limits within which it must promote and defend public justice, particularly when it comes to such non-marital long-term supportive relationships and the consequential entitlements thereof. (Of course, these do not have to be sexually-based relationships). These questions need to be considered and this debate is also being carried forward in polities around the globe. It places a demand upon all citizens, and not just parliamentarians and those drawing up legislation. We need to develop a clearer understanding of where we stand on a range of issues related to these matters while clarifying the task of Government in its role of rightly defining marriage and all other kinds of social relationships as well. This is vital since we are immersed in the development of a very complex and highly differentiated global society, whether we like it or not. And this is all the more reason why it is important to maintain correct and accurate definitions in law, also of the marriage institution, and not to mis-define it in the way the Bill proposes.

Marriage is not the only relationship that makes an indispensable contribution to public life from out of the 'private' sphere. Like marriages, 'domestic partnerships' of various sorts, are entwined in various ways and to various degrees, in diverse institutions with their own networks of accountability. We seem to be living within a fabric of ever-increasing social complexity. In this historical context, the efforts by lobbyists for greater justice for homosexuals has also had the positive side-effect of drawing public attention to this new and intensified social complexity (sometimes referred to as a 'post-industrial' complexity). This then requires equally complex responses from legislators, courts, political parties and of course the electors, the general public who have

various responsibilities, public and private.

The Ongoing Need for Fresh Legislative Work on "Living Together"

In that sense, as I make this contribution, I want to stress that I am aware that I am contributing (somewhat like a spectator) to the ongoing public-legal and political discussion about that complexity that takes place in Parliament and in the discussions of political parties. This discussion seems to be about emerging dimensions of responsibility for us in our complex society, and elected legislators are hard-pressed to develop what are fresh, or perhaps completely new, legal understandings about our 'living together'. Our diverse and differentiated social life, in so many of its aspects, depends upon various socially structured forms of partnership and co-operation, friendships and alliances. Our task as Government and citizens must be to form a public-legal framework which does justice and gives due regard to **all** the diverse ways in which all fellow citizens are working out their lives these days. But suffice to say that my view is that any attempt to re-define marriage to allow for the inclusion of homosexual life-friendships (or other non-married committed-for-life-partnerships), as they make their own contribution to this social complexity, will simply make it more difficult to develop a coherent and just legal framework to take account of **all** the diverse and complex relationships, including non-sexually oriented life-friendships/ life-partnerships that are already actively present and making their vital contribution. Changing the definition of marriage to suit the current demands of one particular kind of committed partnership (or co-habiting friendship) is not going to promote public justice.

The Implications Legal, Political and Social

The passing of the proposed amendments to the Marriage Act by the Federal Parliament can not stop at merely giving a new definition to marriage and homosexual relationships. It would also seem to imply that henceforth all homosexual relationships will be considered as bona fide potentially lawful 'marriages'. Such relationships will simply require the "two persons" involved to come to the view that they wish to see themselves as a 'marriage' and therefore Government will, by virtue of this amendment being passed into law, be required to comply with this wish. The proposed amendment seems to avoid the question of whether the relationship is, or can be, a marriage. The changes to the definition require Government to accept as marriage that relationship which is defined as marriage by the two people desiring their relationship to be so defined.

I can only conclude that the Senator herself or the framers of this legislation view "marriage" (as defined in the Marriage Act) as some kind of entitlement (if not a right) and for the definition of this institution to be fair and just it

needs to be redefined to include all who may wish to be so entitled. This actually side-steps the question of rightly distinguishing marriage from all other social relationships and seems to subsume that empirical question under a political requirement that any definition of marriage must be wrong if it is not defined in terms of a right that is available to all persons.

There are indeed definite 'downstream' public-legal moral implications if marriage is to be legally re-defined in the way proposed. To change the wording so as to include a variety of 'committed-for-life-partnerships' whether any same-gender relationship is sexually-oriented or not, will not only legally redefine marriage for homosexual people who want their friendship to be viewed as a lawful marriage. Any redefinition of lawful marriage to include homosexual friendship as marriage must thereby imply a Government endorsed change to its preferred view of how **all** married people should henceforth view their own marriages. That would mean a fundamental change to our political tradition itself and below I try to draw out some of the implications.

The basis upon which these changes are proposed is said to be the 'rights' of the two persons concerned. It is claimed that it is up to them as to whether they would want to be known as a 'married couple'. And if they do, then, as the Bill suggests, Government should, after due process and registration, merely comply with this request. This, in itself, raises other complex legal questions about the definition of 'civil rights' and whether marriage is to be viewed as such. There are very good jurisprudential reasons for saying that marriage is not a 'civil right'. Indeed, marriage (and family) are not the creations of public law.

Freedom of Association and Freedom of Speech

If marriage is now to be legally re-defined as merely a union of "two persons" who want to assert their 'right' to view themselves as married, then that redefinition will be made on the basis that it is actually a violation of their human rights for Government not to make this change. This proposed change to the legal definition of marriage must be on the basis of the demonstrated injustice of the current definition of marriage in the Marriage Act. If the changes become law will it not mean that henceforth in this polity marriage will indeed be viewed as a 'right', and a 'right' that is conferred by Government? The assumed current injustice is therefore that the rights of persons to be considered married is blocked by a legal definition that accepts that marriage is a relationship of a male to a female person. And so this is a proposal that our public-legal order makes a decided shift away from that purportedly unjust definition of marriage.

The 'conventional' definition enshrined in our law, assumes that marriage is a lifetime male-female bond, but it also includes a ('limited Government') view that marriage is transacted outside the political sphere albeit with public-legal

implications and consequences that then require its recognition as marriage by Government. The unintended consequence of this shift in legal definition, which would follow from this proposed change, is that the transaction of marriage must be viewed legally as a 'civil right' and hence within and inside the political sphere.

There is thus a further serious consequence should the law be changed in this way that requires careful deliberation before it is attempted. It is this: what happens once the change is made and a new definition of the marriage institution (as a civil right) comes into effect. Will it not mean that those who do not believe that homosexual partnerships are, or can be, marriages, will be unable to say so, without in some way challenging, if not violating, the **civil rights** of such persons who will thereby be legally entitled to refer to their committed life-long partnerships as lawful marriages because the law will recognise them as such? What happens in this instance to those who dissent, those who wish to speak openly about their dissenting view of marriage? Will not such speech be aimed at removing the civil rights of a sector of the population? Will not the Government then, under its own law, be required to limit or ban such speech?

Currently, freedom of association and freedom of speech means that such couples and such people supportive of these couples, are indeed now free to refer to these relationships as 'marriages'. There is nothing outlawing the ascription of the term 'marriage' by a homosexual couple or any other co-habiting couple (sexually bonded or not) referring to their relationship. There is no law forbidding anyone referring to such 'couples' as married partners. Indeed, currently, there is no law that forbids people from saying what they like about the marriage institution itself. But with the passage of these amendments into law, and since the amendments are in terms of the 'civil rights' of the 'two persons' involved, the Government will now have to view such "marriage" relationships in terms of the 'civil rights' of the contracting parties, and therefore it will have to actively counter the view of those who continue to speak out and say that a homosexual relationship is not a marriage. If marriages are indeed a matter of 'civil rights', as these changes would seem to imply, the Government would have no option but to vigorously defend them. If such 'civil rights' are granted then such 'civil rights' should be appropriately protected, and in that case it is difficult to see how the 'civil rights' of such 'married' people could be protected without also restricting the free speech of those who do not so believe.

Hitherto, it seems, freedom of speech gives room to families, extended families, churches and other groups to say that (heterosexual) couples living in de facto relationships, or living adulterously, are not acting properly according to the norms of marriage. But with the proposed change in definition there is a

question as to whether a change to the definition of marriage on the basis of the demands of 'civil rights' will mean that those who do not believe that a homosexual relationship is a marriage will be henceforth entitled to say so, (or, for instance publishing the kind of view I am setting forth here) without publicly challenging what are the rights of the persons involved.

These days, public statements that are clearly against another citizen's civil rights are, quite appropriately in my view, proscribed and may well be deemed 'incitement'. But will not this change of definition, on this proposed 'rights' basis, require a significant curtailment of the freedom of speech for a significant portion of the population who may, for whatever reason, have a contrary view to the proposed definition? It would seem to me to follow logically, should 'gay marriage' be granted on the basis of the 'civil rights' of the 'couple' concerned according to the new definition. It is hard to see how it could not be granted on such a basis.

Further Consequences

If the members of Parliament are to pass this legislation, are they prepared to follow through on what would have to be a significant commitment? Are they willing, not only to change the legal reality via this legislation, but to work legislatively for a thorough change to social and cultural reality itself, as that is experienced across Australian society? Have members been elected to make such wholesale changes? Are members really prepared to work at defending the proposition that 'homosexual marriage' with other forms of 'committed partnerships', are true marital options for Australia's young people? Please don't misunderstand me. Here I am certainly not suggesting that Parliamentarians should ever become active in any way whatsoever in attempts to remove any rights or entitlements from any non-married couples who qualify for them, or indeed to advocate any restriction of anyone's freedom of association or the freedom of speech. But it has certainly not been demonstrated by those proposing the Bill that marriage itself is such an entitlement. In fact, one might suggest that the attempt to re-define marriage in the way the Bill proposes, is really an attempt to transform marriage into a form of entitlement.

What I am focusing upon is the Parliament's willingness, should this Bill be passed into law, of following through consistently on the commitment that passage of this Bill would require. Is Parliament prepared to invest in the significant educational and pastoral resources necessary to maintain what (members may believe but I clearly do not) is a fundamental change that needs to be made within our polity to the reality of marriage as an institution?

I wonder whether the motivation for this Bill comes from a belief that the proposed change to the definition of marriage is merely the final legislative step - the last logical move - in a much wider process that has, as we have noted,

justly expanded welfare, industrial, superannuation, inheritance and other entitlements. The process has helped to transform our social landscape. But if this is the rationale for this legislation, as I have intimated above, this 'final step' misunderstands the legal process. Entitlements have been widened with extensive changes to social security and in other legislative areas to overcome the perpetration of significant injustice in the administration of the public-legal order. It is that administration with its appeal to marriage as justification for exclusion of non-married people, not the definition of marriage itself, that has had to be overcome.

Financial Impact

Where are the budgetary consequences outlined for the Government's re-education programme? The **Explanatory Memorandum** says there are no budgetary consequences. This cannot be so. The change to the definition of marriage is no mere footnote to the aforementioned just provision of entitlements in our society. Such a change in definition has to be significant and there will have to be large-scale budgetary consequences for a shift of this magnitude in political reality. Marriage would henceforth be viewed as a political institution and Parliament cannot vote on this matter without also being willing to invest the kinds of public funding that will be needed not only to re-educate the younger generation, but to engage in the wholesale (I would call it *ideological*) re-education of the *entire* population about the consequences of this change. Anything less than that would indicate to me that a 'AYE' vote on this issue lacks genuine commitment to carrying through *politically* with the consequences of such a change in the lawful definition of marriage for this polity. If it is the right and just thing to do, then it should be done. But is it right and is it just? I do not think so and I urge Senator Hanson-Young and her fellow Senators to seriously consider what I am saying here.

Let me explain a little further. This is not a change that will simply be absorbed by people in their private lives, even if that is the expectation of the Senator who is putting forth this Bill. Why? If Parliament passes this legislation, then it is saying that marriage is henceforth a 'right' conferred by Government. Is Government going to be willing to use its power and authority to maintain this 'right' by legislative and policy action that is necessary whenever rights have to be upheld?

The **Explanatory Memorandum** simply says that Financial Impact is Nil. If that is truly and seriously what the Senator believes, I have to wonder whether this Bill has been put forward as merely a token gesture in the knowledge that it will not be accepted. If so, as I have said above, the drawing up of the Bill and putting this issue to the Parliamentary and legislative test, may have served a good purpose in promoting public debate and in that sense it can be welcomed.

But to me "Financial Impact: Nil" suggests that this proposed change, and its dramatic consequences, have not been adequately thought through in any systematic way. Would not such a legislative initiative, endorsed by the Parliament, have significant consequences for the Federal and State Government departments concerned with education, health, family and community matters, industry etc?

Would it not require ongoing initiatives, at least of an educational, if not other, kind, to ensure that this change in legal definition begins to characterize our society in a thorough-going way? As I have asserted already, changing the definition of marriage in the way proposed, assumes that marriage (if not the family) is actually created by public law through the ascription of this particular 'civil right' to all citizens who may wish to enter into it. In that case the entire country stands in need of a fundamental re-education which must be the Government's responsibility and can not be left solely to organisations which have hitherto promoted 'gay marriage'.

Such public re-education would require, for example, not only homosexuals explaining why homosexuality is a valid form of marriage.

Such a change in definition would require Government and its officers to explain the change in the definition and to explain to the community why all marriage, not just 'gay marriages', are now to be viewed a 'right'. It would also require Government itself to maintain the bulk of the public funding for this large-scale re-education programme to ensure that this 'right' was adhered to across the country. I can give only some of the public re-education issues which might include:

1. Explaining what marriage now is and educating people about the Government's preferred views on the relationship between sexuality, sexual intercourse and marriage;

2. Explaining what 'having sex' is and what it means;

3. Funding public sex education to explain and commend the view that, contrary to the dominance of inherited previous prejudices, that homosexuals do engage in coitus;

4. Initiating and maintaining a significant and thorough re-education programme which would include funding for the re-writing of all biology, psychology, social studies and history textbooks in schools.

5. Changing the way male and female anatomy is taught in schools to accommodate the view of the new approach to normative sexuality that is implied in the legislation;

6. Promoting marriage as a legalized and publicly-authorized form of sexually-shaped friendship.

I am not wanting to detract from the very serious issues we are discussing here. The above are dimensions of a notional educational programme which I would not endorse nor would I participate in it.

But I am wanting to point out some of the obvious responsibilities that will fall on subsequent Australian Governments if Parliament should choose to pass this legislation and thereby re-define marriage for everybody to accommodate relationships that are not, speaking legally or in any other way, marriage. The implications would be significant and of no little weight.

Obviously, I am of the view that the proposed legislation is seriously mistaken, not only about the nature and character of marriage, and how that is to be understood in law; as it stands the Bill demonstrates a failure to understand the consequential implications for Government in Australia should such a legal redefinition become law for this Commonwealth.

Other Implications That Need to be Thought About

To extend a legal definition of marriage to include relationships which are not marital (quite apart from the fact that large sectors of the community would view marriage in a contrary way) makes it somewhat more tenuous to maintain the same legal basis for rejecting some forms of marriage which are currently not recognised by our laws as lawful marriages (polygamy, polyandry) and some other legal prohibitions to sibling and close-relative marriage.

Will the proposed changes to the law now mean that any long-term friendship whatsoever can, in time, come to be defined as a de facto marriage and thereby entitled to the same rights as de facto marriages?

Conclusion

So how would this change to the definition of lawful marriage have a positive effect upon marriages as they exist in Australia today? It is not at all clear to me, from what I have heard from the advocates of this proposed change, how they see this (to me illicit) legislative incursion strengthening the marriage institution. These days, from all accounts, marriage is having to weather many kinds of social, commercial, economic, cultural and ethical challenges to its viability. How will these challenges be lessened by making this fundamental re-interpretation part of our public-legal order? My suspicion is that such a change will simply bequeath a legacy of compounded confusion that a later generation of elected parliamentarians will have to resolve. And by all accounts, their job is going to be hard enough without such added complexities.

I thank the Senator for making the Bill available for debate. I thank the Senate Committee for considering the Bill and receiving this Submission. I submit that the proposed changes are not at all in the interests of greater public justice for the Commonwealth.

Thank-you.

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Appendix

Center for Public Justice

Guidelines for Government and Citizens.

Homosexuality

1. Sexual orientation should have no bearing on a person's status as a citizen with civil rights in the political community. Civil rights include the right to life, property, religious freedom, free speech, freedom of association, access to a fair trial, participation in political and legal processes, and equal treatment under the law. When the civil rights of citizens are threatened because of their sexual orientation, it may be appropriate for government to provide special protection against such discriminatory treatment.

2. Human society includes various forms of friendship and relationships, some of which involve enduring commitments. There is no reason to single out homosexual relationships for extra public-legal recognition or benefit. The uniform protection of civil rights assures all citizens, regardless of their sexual orientation, of the right to form associations for legal, educational, financial, religious, and other purposes.

3. In addition to recognizing the civil rights of individuals, public law should also recognize the rights of certain institutions and organizations – such as marriage, family, church, university, and corporation. Only by doing this can government do justice to the diverse institutions of a complex society.

4. Marriage is one of the most important institutions of any society and should be recognized as a life-long covenant between a man and a woman that includes and legitimately bounds sexual intercourse (coitus). Sexual intercourse holds the potential for life-generation and should therefore be contained within marriage. From marriage may emerge children and the parental responsibility of spouses, who with their children constitute a nuclear family.

5. Homosexual relationships do not entail coitus and do not have the potential for life-generation. Consequently, such relationships neither constitute marriages nor, through procreative capability, can become families. The attempt to attain for a homosexual partnership the legal identification of marriage is thus a legal error based on an empirical mistake.

6. Public law does not create marriage or the family, which originate outside the political bond. But the law should recognize these two institutions and may, for purposes of public health and social wellbeing, support and regulate them. The primary aim of public recognition, support, and regulation should be to

protect and encourage these institutions and the parental care of children. This is essential for a healthy and stable society.

Implications

1. If 'domestic partnerships' are given legal recognition for the purpose of opening certain health care and death benefits to homosexual partners, the same privileges should be made available to non-homosexual non-marital partners and friendships. It would be discriminatory to single out one kind of non-marital relationship for a privilege usually granted to marriage partners while denying that privilege to other kinds of enduring partnerships and committed friends.

2. The freedom of homosexual persons to associate and form organizations should in no way be treated as the legal basis for requiring that every free association, church, and professional organization in society grant entrance to homosexuals. The very meaning of free association is that those who associate may set the criteria for entrance into their association, and in some cases groups may have religious, ethical, and philanthropic criteria that exclude those who do not share their reasons for associating.

3. Those who consider homosexuality an abnormal and unhealthy form of human relationship should, nonetheless, work to uphold the civil rights of all citizens, including those who practice homosexuality, just as they would uphold the civil rights of practicing heterosexuals who violate their marriage bonds or engage in premarital heterosexuality. Abnormal and immoral practices, whether by heterosexuals or homosexuals, do not present a reason for the denial of civil rights to those who act in those ways.

For Further Reading

Coolidge, David Orgon. 'Same-Sex Marriage? *Baehr v. Miike* and the Meaning of Marriage,' *South Texas Law Review*, 38:1-119. March 1997.

Gallagher, Maggie. 'What Marriage Is For,' *The Weekly Standard*. August 4, 2003.

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