



Ensuring Respect, Recognising Diversity

Submission to the Senate Committee on Legal and Constitutional Affairs on its Inquiry into the *Marriage Amendment Bill 2009* (Cth)

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1. Executive Summary

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its Inquiry into the *Marriage Amendment Bill 2009* (Cth) (**Bill**), which proposes to amend the *Marriage Act 1961* (Cth) (**Marriage Act**) to permit two people to marry regardless of their sex, sexuality or gender identity.
2. The realisation of the rights to non-discrimination and equality are fundamental to a free and democratic society such as Australia's. Conversely, where discrimination and inequality exist, they undermine the very foundation and fabric of that society. This is as true in relation to marriage and family relations as it is for other areas of life. For these reasons, PILCH commends the initiative to undertake this important inquiry into marriage equality and fully endorses the Bill's commitment to eliminating discrimination and inequality on the grounds of sex, sexual orientation and gender identity.
3. In summary, PILCH makes the following recommendations:

Recommendation No. 1:

The Australian Government should adopt a human rights-based approach to the regulation of the institution of marriage. In particular, the Marriage Act should be informed by and reflect the rights to non-discrimination and equality, including on the grounds of sex, sexual orientation and gender identity.

Recommendation No. 2:

The Australian Government should expand the definition of the term 'marriage' in section 5(1) of the Marriage Act to allow for legal recognition of same-sex relationships as marriage, as provided for in section 1 of Schedule 1 of the Bill.

Recommendation No. 3:

The Australian Government should not follow the approach of the UN Human Rights Committee in *Joslin v New Zealand*. Instead, it should adopt the approach followed in jurisdictions such as South Africa and Canada that establish a right to marry, irrespective of a person's sexual orientation or gender identity.

Recommendation No. 4:

The Australian Government should afford legal recognition to same-sex marriages that have been lawfully contracted in another country. In this connection, it should repeal section 88EA of the Marriage Act, as provided for in section 5 of Schedule 1 of the Bill.

Recommendation No. 5:

All other provisions of the Marriage Act that discriminate on the grounds of sexual orientation or gender identity should be amended in accordance with the Bill.

Recommendation No. 6:

Should the Bill be enacted into law, the *Family Law Act 1975* (Cth) and other related laws should be amended to ensure that they are consistent with the reformed Marriage Act.

2. About PILCH

4. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono clearing house referral schemes (Public Interest Scheme, Law Institute Legal Assistance Scheme and Victorian Bar Legal Assistance Scheme) and two pro bono outreach legal clinics (the Homeless Persons' Legal Clinic and the Seniors Rights Legal Clinic).
5. PILCH's objectives are to:
 - improve access to justice and the legal system for those who are disadvantaged or marginalised;
 - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
 - refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
 - support community organisations to pursue the interests of the communities they seek to represent; and,
 - encourage, foster and support the work and expertise of the legal profession in pro bono and public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.
6. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.
7. PILCH has a particular interest in the elimination of all forms of discrimination and the achievement of substantive equality. To this end, it has facilitated numerous pro bono referrals and made countless policy and law reform submissions that aim to realise these important goals. For example, in 2009, PILCH made a joint submission (with the Human Rights Law Resource Centre (**HRLRC**)) and gave evidence to the Scrutiny of Acts and Regulations Committee on its inquiry into the exceptions and exemptions to the *Equal Opportunity Act 1995* (Vic). In 2008, PILCH made a

submission to the Senate Standing Committee on Legal and Constitutional Affairs on the effectiveness of the *Sex Discrimination Act 1984* (Cth). The present submission is made in the context of PILCH's efforts to address systemic discrimination and inequality against marginalised and disadvantaged groups, including persons who belong to sexual and gender minorities.

3. Nature and Scope of Submission

8. This submission analyses the Bill through a human rights framework and draws primarily on the rights to non-discrimination and equality. The submission begins in Section 4 by providing a brief overview of the legal concept of marriage, as currently defined in the Marriage Act. In Section 5, the submission outlines the proposed amendments in the Bill. The submission continues in Section 6 by analysing the significance of the legal recognition of same-sex relationships as marriage. In Section 7, the submission examines Australia's obligations under international and domestic human rights law to eliminate discrimination on the ground of sexual orientation and gender identity. Section 8 next considers the legal response to same-sex marriage in comparative jurisdictions and highlights public support for this form of marriage in Australia. The submission concludes in Section 9 by situating the Bill within the context of Australia's human rights obligations and urging the Federal Government to enact the Bill as a matter of priority.
9. This submission focuses primarily on the legal recognition of same-sex relationships as marriage, for gays and lesbians. However, PILCH acknowledges that the current legal framework also has adverse implications for couples where one or both members are transgender or intersex. In relation to the position of transgender and intersex persons, PILCH endorses the submission of the Lesbian, Gay, Bisexual, Transgender and Intersex Network of the National Association of Community Legal Centres (dated 28 August 2009).

4. Overview of the Relevant Provisions of the *Marriage Act 1961* (Cth)

10. Section 5 of the Marriage Act currently limits the meaning of the term 'marriage' to the 'union of a man and a woman to the exclusion of all others, voluntarily entered into for life'¹. The effect of this limitation is that heterosexual, but not homosexual, couples can lawfully enter into marriage under Australian law. Put simply, depending on a person's sexual orientation or gender identity, he or she can be lawfully denied the right to enter into marriage in Australia.
11. Even where a same-sex couple has been lawfully married in another jurisdiction, that marriage will not be recognised in Australia. Section 88EA of the Marriage Act provides: 'A union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognised as a marriage in Australia'. Senator Hanson-Young explained in her Second Reading Speech that, as the law currently stands, 'someone who is legally married in Canada can step off the plane at Sydney International Airport and no longer be considered married under Australian law'².

¹ See also *Family Law Act 1975* (Cth), s 43(1)(a) (providing: 'The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to: the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life').

² Senator Sarah Hanson-Young, Second Reading Speech: *Marriage Equality Amendment Bill 2009*, 24 June 2009, 1.

12. In addition to sections 5 and 88EA, other provisions of the Marriage Act refer directly or indirectly to the union of 'a man and a woman' only.³ These provisions reinforce that the legal concept of marriage, as it is currently defined under the Marriage Act, refers to heterosexual, and not homosexual, marriage.
13. At the Australian Labor Party (**ALP**) National Conference in 2009, the ALP voted against recognising same-sex relationships as marriage. Instead, it said it would remove the definition of marriage (which is stated as being a union between a man and a woman) from its National Platform and Constitution and continue to move towards a national relationships register to enable same-sex couples to register their relationships.⁴
14. A number of relationship registration and civil partnerships schemes have already been established at the state⁵ and local⁶ level of government. However these schemes are few and far between and do not operate consistently. They also fall short of the equal legal recognition of same-sex relationships, with heterosexual relationships.

5. Overview of the Proposed Amendments in the *Marriage Equality Amendment Bill 2009* (Cth)

15. The Bill proposes to amend the Marriage Act to eliminate discrimination in marriage and allow same-sex attracted individuals to marry each other. Its objectives are to:
 - remove discrimination on the grounds of sex, sexuality or gender identity;
 - recognise that freedom of sexuality and gender identity are fundamental human rights; and,
 - promote acceptance and the celebration of diversity.⁷
16. The Bill proposes to expand the definition of the term 'marriage' in section 5(1) of the Marriage Act to mean 'the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into for life'. Under this formulation, two people, whether of the same or opposite sex, would be able to lawfully enter into marriage in Australia, provided that they each satisfy the other preconditions of marriage, such as having attained the minimum legal age of marriage.
17. The Bill also proposes to repeal section 88EA of the Marriage Act, which currently provides that a same-sex marriage lawfully entered into in another jurisdiction is not legally valid in Australia. The remaining proposed amendments in the Bill purport to reform those provisions of the Marriage Act that would need to be changed should the definition of the term 'marriage' be expanded to include 'the union of two people, regardless of their sex, sexuality or gender identity'.

³ See Marriage Act, ss 45(2), 46(1), 72(2), Part III of the Schedule (table item 1).

⁴ See 'Government Refuses to Bend on Gay Marriage', *The Age* (Melbourne), 1 August 2009, available at: <http://www.theage.com.au/national/government-refuses-to-bend-on-gay-marriage-20090801-e4x8.html>; Emma Rodgers, 'Labor Turns Down Gay Marriage' *ABC News*, 1 August 2009, available at: <http://www.abc.net.au/news/stories/2009/08/01/2643063.htm>.

⁵ See *Civil Partnerships Act 2008* (ACT); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic).

⁶ The City of Melbourne, the City of Yarra and the City of Sydney have each established relationship declaration registers/programs.

⁷ *Marriage Equality Amendment Bill 2009* (Cth), s 3.

18. PILCH welcomes the proposed amendments in the Bill and commends Senator Hanson-Young for taking the initiative to introduce the Bill into Federal Parliament. In particular, PILCH commends the Senator for adopting a human rights approach to marriage.

6. The Significance of the Legal Recognition of Same-Sex Marriage

19. As in other societies, marriage is an important institution in Australia. It is an institution that 'represents a legal status in the nature of a partnership conferred and prescribed by the state. The state has reserved to itself the power to regulate that status'⁸. This includes the power 'to determine the requirements of a valid marriage, to control the capacity and qualifications of the parties to a marriage, to stipulate the formalities to be complied with before marrying, and to lay down the procedures necessary for the solemnisation of the marriage'⁹.
20. The consequences of legal recognition of marriage or, perhaps more aptly in the context of the present discussion, the absence of legal recognition, are thus extremely significant. The consequences are particularly marked for those individuals who are unfairly denied the right to lawfully contract marriage. This is particularly true for same-sex attracted individuals. Justice Albie Sachs of the Constitutional Court of South Africa has explained, for instance, that

the impact of the legal void in which same-sex couples are compelled to live is real, intense and extensive. To appreciate this it is necessary to look precisely at what it is that the law offers to heterosexual couples, and, conversely, at what it denies to same-sex couples. Such scrutiny establishes that the consequences of the total exclusion of same-sex couples from the solemnities and consequences of marriage are far from academic¹⁰

21. Examining these consequences in detail, Justice Sachs further explained:

The exclusion of same-sex couples from the benefits and responsibilities of marriage ... is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. ... It follows that, given the centrality attributed to marriage and its consequences in our

⁸ *Quilter v Attorney-General* [1998] 1 NZLR 523, at 534 (NZ, Court of Appeal) (per Thomas J.). See also *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others; Lesbian and Gay Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (Sth. Afr., Constitutional Court) [**Fourie and Lesbian and Gay Equality Project Cases**], at para 64 (per Sachs J.).

⁹ *Quilter v Attorney-General*, *ibid.*

¹⁰ *Fourie and Lesbian and Gay Equality Project Cases*, above note 8, at para 62 (per Sachs J.).

culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.¹¹

22. The sentiments expressed so eloquently by Justice Sachs regarding the significance of legal recognition of same-sex relationships as marriage are echoed in the following personal stories:

My partner and I have been together now for nine years. During that time, we have watched many of our friends prepare for and make a life commitment to each other through marriage. We have discussed and agreed that we too are ready for this commitment. However, the current law in Australia prevents us from doing so. We are offered instead second-class alternatives such as registering our relationship. These options are humiliating. They carry neither the weight nor respect of marriage but rather carry with them the stigma of inferiority; a half measure offered to dampen protest. In our mind, to accept these alternatives is to accept the premise that our relationship is not good enough for the institution of marriage. Without the possibility of indicating, in equal measure with our friends, our commitment to each other, we continue to feel that our government and country fails to recognise or accord the same level of respect for ourselves as individuals and our relationship as that accorded our family and friends.

M. Kerr, 35, Melbourne, 27 August 2009

In my country of origin, Canada, the recognition of same-sex marriage has in no way devalued the institution of marriage. How could it? It has instead enhanced the concept of marriage, which, in both straight and gay contexts, is fundamentally the same. At the gay weddings and straight weddings I have attended, we have in equal measures and in similar ways celebrated the by-no-means easy decision of two individuals to enter into a relationship of mutual lifelong commitment and love and to communicate this decision before their assembled communities, friends and relatives. Unfortunately, gays, lesbians and transgendered people in Australia do not have the option of having such joyous occasions. There is no legally defensible reason for this, particularly given the necessary separation between church and state and the many protections afforded to freedom of religion.

Indeed, discrimination against gays, lesbians and transgendered people remains the only legally acceptable form of discrimination in our society. Allowing us access to a 'separate but equal' civil partnership (which has not even happened everywhere in Australia yet) places our relationships on a lower level than straight relationships and demeans our equal capacity to form the kind of partnerships that 'normal' couples do, those who have the 'choice' of marriage available to them. 'Separate but equal' – the idea of segregating us from you based on personal characteristics over which we have no control – is a pernicious, discredited doctrine, except, it seems, when it comes to us.

To paraphrase Jon Stewart, marriage, which was not even a sacrament until the 1200s, has constantly been redefined and has evolved throughout history. It used to be purely a property arrangement. People of different races once could not marry. If marriage, and the stability of marriage, forms the bedrock of our society, why would you preclude marriage for an entire group of people? And if all people are created equal, why is it corrosive to society to allow gay people to have the same privileges that all humans enjoy? You're not being asked to marry a guy. We're asking you for the freedom to marry the person we love.

TJ Riddell, 30, Melbourne, 26 August 2009

The union of marriage should symbolise the love and commitment of two people to each other as persons. The law should not privilege the commitment of two

¹¹ Ibid, at paras 71-72 (per Sachs J.) [citations omitted].

people of the opposite sex. I believe the current status of the law is discriminatory and archaic.

J. Bayly, 23, Melbourne, 26 August 2009

Although I personally do not believe in the institution of marriage, my beliefs should not limit the ability of others to marry should they so chose. Obviously the Australian Government does not share this belief. By only affording people in heterosexual relationships the opportunity to enter into legally binding marriages the government is implying that we are somehow less than other members of society. This form of discrimination creates a dual class system that preferences homogeneity over recognition and acceptance of how the diversity of peoples' lived experiences enriches the fabric of our society.

D. Houseman, 35, Melbourne, 27 August 2009

A significant number of my friends are gay or lesbian. Their capacity for love and to enter into meaningful relationships is no different than my own. Yet, the Australian Government allows me to contract marriage because I am heterosexual, whilst, at the same time, refusing my friends (or other similarly situated individuals) this same right because they are homosexual. In my opinion, this lack of legal recognition suggests that homosexual love is in some way less meaningful or tangible than heterosexual love. I simply cannot accept this proposition as being true and, indeed, find it extremely offensive. Love between two people, whether of the same or opposite sex, is something to be recognised and celebrated; it is not something that should ever be ignored, marginalised or stigmatised. I am of the strong opinion that same-sex attracted individuals should be afforded the same right as opposite-sex attracted individuals to enter into marriage.

S. Cusack, 28, Melbourne, 26 August 2009.

My partner and I have been together for eight years. We have a committed relationship based on love and mutual-respect, yet because we are both female the Australian Government has denied us the option of getting married. Marriage is undeniably an important social institution in our culture so, whether my partner and I wanted to get married or not, it is highly discriminatory that we should be excluded from marriage based on our sex or sexual orientation. I don't think civil unions or civil partnerships are an adequate alternative to marriage for anyone – in fact it's offensive to me that there should be an alternative, as it just perpetuates the idea that same-sex unions are different and somehow not as legitimate as opposite-sex unions. If two people who love each other (whether they are straight, gay, bisexual or transgendered) want to get married they should absolutely have the right to do so.

R. Brown, 26, Melbourne, 27 August 2009.

23. There are undoubtedly extremely significant consequences that flow from the lack of legal recognition of same-sex marriage. As the above discussion demonstrates, these consequences range from legal to social and emotional. In addition, there are significant consequences for same-sex couples who wish to have, or already have, children.

7. The Rights to Non-Discrimination and Equality

24. Australia is obligated, under international and domestic human rights law, to respect, protect and fulfil the rights to non-discrimination on the grounds of sexual orientation and gender identity, and substantive equality.

(a) International and Comparative Human Rights Law

25. Under international human rights law, it is unlawful to discriminate against a person because of his or her sexual orientation¹² and gender identity.¹³
26. Article 2(1) of the ICCPR requires States Parties 'to respect and to ensure' the rights in that treaty 'without distinction of any kind, such as ... sex ... or other status'. Article 26 further provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... sex ... or other status'. Article 26 moves beyond article 2(1), which prohibits discrimination in the exercise of the enumerated rights in the ICCPR, and establishes a free-standing right to non-discrimination.¹⁴ Although sexual orientation is not an explicit ground of discrimination in articles 2(1) or 26, the UN Human Rights Committee has interpreted other prohibited grounds, namely 'sex' and 'other status', to include discrimination based on sexual orientation.¹⁵
27. In addition, article 2(2) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* provides that States Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to ... sex ... or other status'. In a number of its *General Comments*, the UN Committee on Economic, Social and Cultural Rights has explained that sexual orientation is a prohibited ground of discrimination in the ICESCR.¹⁶
28. In 2007, a group of human rights experts developed a set of international legal principles known as *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.¹⁷ Principle 2 affirms the right of all persons to enjoy human rights without discrimination on the basis of sexual orientation or gender identity, and provides that all persons are entitled to equality of and before the law without any discrimination on this ground. In addition, Principle 2 requires states to take all

¹² Sexual orientation has been defined as 'capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender': *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, preamble [**Yogyakarta Principles**].

¹³ Gender identity is defined as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms': *Yogyakarta Principles*, *ibid.*

¹⁴ See generally Human Rights Committee (**HRC**), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994).

¹⁵ See *Toonen v. Australia*, HRC, Communication No. 488/94, UN Doc. CCPR/C/50/D/488/92 (1994); *Young v. Australia*, HRC, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003). See generally also Sarah Joseph, 'Gay Rights Under the ICCPR – Commentary on *Toonen v. Australia*' (1994) 13 *University of Tasmania Law Review* 392.

¹⁶ The Yogyakarta Principles are 'a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply': http://www.yogyakartaprinciples.org/principles_en.htm. See generally generally Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', (2008) 8(2) *Human Rights Law Review* 207, at 214-215.

¹⁷ See generally O'Flaherty & Fisher, *ibid.*

appropriate measures to ensure the right to the universal enjoyment of human rights and the right to recognition before the law.¹⁸

29. Sexual orientation is also a prohibited ground of discrimination in countries such as Canada,¹⁹ South Africa,²⁰ the U.K.,²¹ New Zealand,²² and Fiji.²³

(b) Domestic Law

30. Each Australian state and territory has enacted legislation that prohibits discrimination against a person because of his or her sexual orientation or gender identity.²⁴ In contrast to the position at the state and territory level, there is no legal protection under federal anti-discrimination laws against sexual orientation or gender identity discrimination.²⁵ However, following the release of a landmark report on entitlements for same-sex couples in 2007,²⁶ the Federal Government enacted the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth) and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth). Together, these laws reformed approximately 100 Commonwealth laws that discriminated against same-sex attracted individuals in areas such as superannuation, social security, taxation, and workers' compensation. Whilst these reforms are welcomed, they did not address the legal recognition of same-sex marriage.
31. In addition to the explicit protections against discrimination on the ground of sexual orientation, all Australian jurisdictions have de-criminalised same-sex sexual conduct.²⁷

* * *

¹⁸ Yogyakarta Principles, principles 1, 3.

¹⁹ See *Charter of Rights and Freedoms* (Can.), s 15(1); *Egan v Canada*, [1995] 2 SCR 513 (Can., Supreme Court) (recognising sexual orientation as an analogous ground of discrimination).

²⁰ See *Constitution of the Republic of South Africa*, 1996 (Sth. Afr.), s 9(3). See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] (12) BCLR 1517 (Sth. Afr., Constitutional Court); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [2000] (1) BCLR 39 (Sth. Afr., Constitutional Court).

²¹ See *Equality Act 2006* (UK), ss 81(1), 82; *Equality Act (Sexual Orientation) Regulations 2007* (UK); *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* (UK).

²² See *Human Rights Act 1993* (NZ), s 21(1)(m); *Employment Relations Act 2000* (NZ), s 105(1)(m).

²³ See *Constitution (Amendment) Act 1997* (Fiji), s 38(2)(a); *Human Rights Commission Act 1999* (Fiji), 17. See also *Nadan and McCoskar v State* [2005] FJHC 500 (Fiji, High Court).

²⁴ See *Discrimination Act 1991* (ACT), ss 7(1)(b), 7(1)(c); *Human Rights Act 2004* (ACT), s 8(3); *Anti-Discrimination Act 1977* (NSW), Parts 3A, 4C; *Anti-Discrimination Act 1992* (NT), s 19(c); *Anti-Discrimination Act 1991* (QLD), ss 7(m), 7(n); *Equal Opportunity Act 1984* (SA), s 29(1)(b); *Anti-Discrimination Act 1998* (Tas), ss 16(c), 16(e); *Equal Opportunity Act 1995* (VIC), ss 6(ac), 6(l); *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 3, 8; *Equal Opportunity Act 1984* (WA), Parts IIAA, IIB.

²⁵ But see *Fair Work Act 2009* (Cth), s 351 (prohibiting discrimination in the workplace on the ground of sexual preference).

²⁶ See Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements. National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007), available at: <http://www.humanrights.gov.au/samesex/index.html>.

²⁷ See *Law Reform (Sexual Behaviour) Ordinance 1976* (ACT); *Crimes Act 1990* (ACT); *Crimes Act 1900* (NSW); *Crimes (Amendment) Act 1984* (NSW); *Criminal Code Act 1983* (NT); *Criminal Code Act 1899* (QLD); *Criminal Law (Sexual Offences) Act 1978-1989* (QLD); *Criminal Law Consolidation Act 1913* (SA); *Criminal Law (Sexual Offences) Amendment Act 1975* (SA); *Criminal Law Consolidation Amendment Act 1976* (SA); *Crimes Act 1958* (Vic); *Crimes (Sexual Offences) Act 1980* (Vic); *Criminal Code 1913* (WA); *Law Reform (Decriminalization of Sodomy) Act 1989* (WA); *Human Rights (Sexual Conduct) Act 1994* (Cth). See also *Toonen v. Australia*, HRC, Communication No. 488/94, UN Doc. CCPR/C/50/D/488/92 (1994); *Croome v. Tasmania*, (1997) 191 CLR 119 (Austl., High Court).

32. The rights to non-discrimination and equality require the Australian Government to ensure that lesbian, gay, bisexual, transgender and intersex people are not discriminated against on the grounds of sexual orientation or gender identity. PILCH considers that the differential treatment of same-sex and opposite-sex marriages in the Marriage Act is a violation of the rights to non-discrimination on these grounds. The Marriage Act excludes same-sex attracted individuals from lawfully entering into marriage on the basis of their sexual orientation and/or gender identity; it does not exclude opposite-sex attracted individuals from doing the same, however, since it privileges heterosexuality over homosexuality.
33. There is no reasonable justification for the differential treatment of same-sex and opposite-sex marriages. That is to say, the failure to afford legal recognition to same-sex marriages does not pursue a legitimate purpose and the means (exclusion of same-sex attracted individuals from the institution of marriage) is neither reasonable nor proportionate. Opponents of same-sex marriage often argue that the purpose of marriage is procreation. However, this argument ignores the fact that: many straight couples do not or cannot procreate; same-sex couples are equally capable as opposite-sex couples of childrearing; and, childrearing is not the sole objective of marriage.²⁸ For these reasons, the purpose of procreation is not a legitimate purpose that is capable of justifying discriminatory treatment. Moreover, as explained in Section 6 of this submission, the consequences of this exclusion are grave and systematic.
34. The Bill seeks to remove this discrimination by granting gay, lesbian, transgender and intersex people the same rights as straight people to marry. PILCH expresses its strong support for an approach to marriage that is grounded in non-discrimination and equality and, for this reason, favours the legal recognition of same-sex recognition. No group should be unreasonably, unfairly and systematically excluded from an institution that is as central to Australian life and society as is marriage. The institution of marriage should be available to all Australians, irrespective of sexual orientation or gender identity. In order to ensure full compliance with its human rights obligations to respect, protect and fulfil the rights to non-discrimination and equality, PILCH strongly urges the Federal Parliament to enact the Bill into law.

8. Same-Sex Marriage

35. In addition to the prohibitions against discrimination on the grounds of sexual orientation and gender identity, there is increasing recognition of same-sex marriage in other jurisdictions.²⁹ There is also significant community support for recognition of these marriages.

(a) Recognition of Same-Sex Marriage in Other Jurisdictions

36. Same-sex marriages have already been afforded legal recognition in a number of jurisdictions. Belgium, Canada, the Netherlands, Norway, South Africa, Sweden, and several U.S. jurisdictions, including Massachusetts, Maine and New Hampshire, all permit

²⁸ See *Halpern v Canada (Attorney General)*, [2003] 65 OR (3d) 161 (Can., Ontario Court of Appeal), at paras 119, 137; *EGALE, Canada Inc. v Canada* [2003] 225 DLR (4th) 472 (Can., British Columbia Court of Appeal), at paras 120-24, 86-90.

²⁹ See, eg, Yogyakarta Principles, principle 24.

same-sex attracted individuals to enter into marriage. For the purposes of the present discussion, it is useful to consider the reasons why some of these jurisdictions decided to recognise same-sex marriage.

South Africa

37. In South Africa, the Constitutional Court first recognised the legal validity of same-sex marriages in the *Fourie and Lesbian and Gay Equality Project Cases*. The Court unanimously held that the South African common law and section 30(1) of the *Marriage Act* of 1961, which denied same-sex couples the right to marry, violated the rights to non-discrimination and equality guaranteed in section 9 of the South African Constitution. On the basis of this finding, the Court made an order invalidating the common law definition of marriage. However, it suspended the operation of that order for 12 months to enable Parliament time to amend the *Marriage Act*.
38. The Court determined that the exclusion of same-sex couples from the benefits and responsibilities of the institution of marriage was not a small and tangential inconvenience; the exclusion had harsh consequences and sent a clear message to the South African community that the love between same-sex couples was not the same, or as worthy of the same recognition, as love between opposite-sex couples. Discussing the violation of the rights to non-discrimination and equality, Justice Sachs, writing for the Court, observed:

A democratic, universal, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equal means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.³⁰

He further observed that same-sex attracted individuals were denied equal protection of the law 'not because of oversight, but because of the legacy of severe historic prejudice against them. Their omission from the benefits of marriage law is a direct consequence of prolonged discrimination based on the fact that their sexual orientation is different from the norm'³¹. Discrimination, in other words, was enshrined directly into the law.

39. According to Justice Sachs, there was no doubt that denying same-sex couples the right to contract marriage denied them equal protection and subjected them to unfair discrimination. He explained that the effect of this denial

³⁰ *Fourie and Lesbian and Gay Equality Project Cases*, above note 8, at para 60 (per Sachs J.) [citations omitted].

³¹ *Ibid* at para 76 (per Sachs J.).

has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution.³²

40. The Court's decision in the *Fourie and Lesbian and Gay Equality Project Cases* led to the enactment of the *Civil Union Act* of 2006. The objectives of that Act are to: 'regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership;' and, 'provide for the legal consequences of the solemnisation and registration of civil unions'³³. A 'civil union' is defined in section 1 of the Act as 'the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others'.

Canada

41. Like South Africa, Canada no longer excludes same-sex couples from the civil institution of marriage. With the starting point that marriage is undeniably an important and fundamental social institution, Canadian Courts and legislatures have concluded that the refusal to allow same-sex couples the right to marry violates equality principles and causes grave harm to the human dignity and freedom of same-sex individuals.
42. In 2005, the *Civil Marriage Act* amended the legal definition of civil marriage to mean 'the voluntary union for life of two persons'. This Act closely followed the Ontario Court of Appeal's decision in *Halpern v Canada (Attorney General)*, in which the Court read the phrase 'two persons' into the centuries-old common law definition of marriage. The Court based its decision on the fact that viewing same-sex relationships as less worthy of recognition than opposite-sex relationships offends the dignity of persons in same-sex relationships.³⁴ In addition, eight other provincial courts found that limiting the institution of marriage to heterosexual couples violated laws governing equality and fundamental freedoms. These courts specifically considered and rejected the alternative to full equality – civil unions and domestic partnerships for same-sex couples – as being a different and inferior scheme of state recognition, akin to the 'separate but equal' doctrine.³⁵ Such differential treatment, under this analysis, effectively denies a traditionally disadvantaged

³² Ibid at paras 75-79 (per Sachs J.) [citations omitted].

³³ *Civil Union Act* of 2006 (Sth. Afr.), s 2.

³⁴ See *Halpern v Canada (Attorney General)*, above note 28, at paras 148, 107.

³⁵ See, eg, *Hendricks v Québec* [2002] RJQ 2506 (Can., Quebec Superior Court), at para 134.

group access to an essential social institution and demeans the long-lasting, loving and intimate relationships that same-sex couples will often form.³⁶

43. In *Reference re Same-Sex Marriage*,³⁷ the Supreme Court of Canada expressly approved the *Civil Marriage Act* (which was then in its proposed form), and found that the Act ensured equality of access to a civil institution. The Court rejected outright the argument that same-sex marriage not only conflicts with the views of those in disagreement but violates their legal rights. Under freedom of religion, religious officials have the right to refuse to solemnise marriages between people of the same sex. Accordingly, the Court emphasised the mere recognition of the equality rights of one group cannot and will not constitute a violation of the rights of another.³⁸ In other words, allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples. It withholds no benefits, nor does it impose burdens on a differential basis. Rather it promotes equality and simultaneously protects the dignity of homosexual individuals.³⁹

New Zealand

44. PILCH acknowledges that, in *Joslin v New Zealand*,⁴⁰ the UN Human Rights Committee declined to recognise a right to same-sex marriage in article 23 of the *International Covenant on Civil and Political Rights*⁴¹ (ICCPR). It held that article 23(2) of the ICCPR only requires legal recognition of a marriage between persons of the opposite sex.
45. PILCH is of the strong opinion that the approach adopted in *Joslin* should not be followed in Australia. In this connection, PILCH endorses the analysis of *Joslin* in the HRLRC's submission that correctly points out, *inter alia*, that:
- 'In focusing narrowly on the definition of marriage, the majority decision does not expressly consider how the marriage provision relates to the broader equality principles established by the ICCPR. However, the case did confirm that, whilst article 23(2) does not create a positive obligation for states to recognise same-sex marriages, it does not prevent them from doing so'.⁴²
 - 'By focusing narrowly on the interpretation of marriage – without exploring the concepts or values that drive this particular interpretation – the decision failed to explain why same-sex couples are not entitled to enjoy the same rights as heterosexual couples'.⁴³

³⁶ See *M. v H.* [1999] 2 SCR 3 (Can., Supreme Court), at paras 74, 57, 62.

³⁷ See *Reference re Same-Sex Marriage* [2004] 3 SCR 698 (Can., Supreme Court).

³⁸ See *ibid* at paras 41, 45-48, 55-60.

³⁹ See *Halpern v Canada*, above note 28.

⁴⁰ See *Joslin v New Zealand*, Communication No. 902/1999, HRC, UN Doc A/57/40 at 214 (2002).

⁴¹ *International Covenant on Civil and Political Rights*, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 U.N.T.S. 171.

⁴² HRLRC, *Marriage Equality – A Basic Human Rights*, Submission to the Inquiry into the Marriage Equality Amendment Bill 2009 (August 2009), at para 14.

⁴³ *Ibid* at para 16.

- 'In light of the sexual orientation rights embedded in the ICCPR, there are compelling reasons in favour of interpreting the marriage provision (article 23(2)) broadly so as to include same-sex couples. This is particularly so given that the marriage provision does not explicitly state that men can only marry women or that women are only permitted to marry men'⁴⁴.
- 'Given that the reference to 'sex' in articles 2 and 26 can be taken to include 'sexual orientation', the HRLRC considers that the marriage provision should also be given a broad interpretation that is informed by the reality of contemporary relationships'⁴⁵.
- 'What *Joslin* fails to appreciate is that the issue of same-sex marriage cannot be viewed in isolation. Rather, it must be set in the context of the ongoing systemic discrimination faced by LGBT people. By failing to recognise same-sex marriage, states perpetuate systemic discrimination against LGBT people and deny them a right which is afforded to all heterosexuals'⁴⁶.

(b) Community Support for Same-Sex Marriage in Australia

46. Research suggests that there is significant community support for the legal recognition of same-sex marriage in Australia. For example, a 2007 Galaxy survey commissioned by GetUp! found that a majority of respondents (57%) supported legal recognition of same-sex marriage.⁴⁷ In 2009, a Galaxy survey commissioned by Australian Marriage Equality found that 60% of respondents supported legislative reform to allow same-sex attracted individuals to marry.⁴⁸ The survey also found that 58% of respondents supported legal recognition of same-sex marriages contracted in jurisdictions that recognise such marriages.⁴⁹ In addition to community support, an increasing number of Australian businesses, including the ANZ Bank, Commonwealth Bank of Australia, IBM Australia, Qantas Airways, Seek, Telstra and Westpac Bank, have recognised same-sex marriages contracted by their employees and customers.⁵⁰

9. Conclusion

47. Once again, PILCH commends Senator Hanson-Young for introducing the Bill into Federal Parliament. The Bill recognises that, in order to eliminate all forms of discrimination against gay, lesbian, bisexual, transgender and intersex people, it is not sufficient to rely only on state-based anti-discrimination provisions. If same-sex attracted individuals are to be treated on a basis of equality

⁴⁴ Ibid at para 17.

⁴⁵ Ibid.

⁴⁶ Ibid at para 18.

⁴⁷ Misha Schubert, 'Public Backs Gay Unions, Equality', *The Age* (Melbourne), 21 June 2007, available at: <http://www.theage.com.au/news/national/public-backs-gay-unions-equality/2007/06/20/1182019204491.html>.

⁴⁸ See Galaxy Research, *Same Sex Marriage Report*, Prepared for Australian Marriage Equality (June 2009).

⁴⁹ See *ibid*.

with opposite-sex attracted individuals, and if discrimination on the grounds of sexual orientation and gender identity are to be eliminated, same-sex relationships must be afforded the same recognition as opposite-sex relationships. Same-sex attracted individuals should not be excluded from the institution of marriage.

48. In contrast to what opponents of same-sex marriage would have us believe, the recognition of same-sex marriage does not undermine heterosexual marriage or the institution of marriage itself. Indeed, as Australian Marriage Equality⁵¹ has noted, '[i]n countries which have allowed same-sex marriages, such as the Netherlands, the number of heterosexual partners who marry has increased, not decreased'⁵². Instead, legal recognition of same-sex relationships as marriages embraces and values same-sex attracted individuals for who they are. It demonstrates equal concern and respect for the dignity of all individuals, irrespective of their sexual orientation and gender identity, and celebrates the diversity of the very individuals that make up society. Importantly, recognition of same-sex marriage removes a significant form of discrimination that is enshrined in the law and, with that removal, the marginalisation and stigma that attaches to being in a relationship that is not recognised as being legally valid.
49. Marriage is not a static institution that is immune from evolution. Our understanding of marriage and its legal enshrinement has changed significantly over time, reflecting important strides in social, cultural and legal thinking. It is important that the Federal Parliament – like South Africa and Canada and the other jurisdictions identified in this submission – seizes this important opportunity to recognise same-sex marriages as legally valid. Such a move would ensure that the legal concept of marriage reflects the views of the majority of the Australian community and be consistent with Australia's human rights obligations, especially its obligations to respect, protect and fulfil the rights to non-discrimination and equality.
50. PILCH fully endorses the Bill and makes the following recommendations:

Recommendation No. 1:

The Australian Government should adopt a human rights-based approach to the regulation of the institution of marriage. In particular, the Marriage Act should be informed by and reflect the rights to non-discrimination and equality, including on the grounds of sex, sexual orientation and gender identity.

Recommendation No. 2:

The Australian Government should expand the definition of the term 'marriage' in section 5(1) of the Marriage Act to allow for legal recognition of same-sex relationships as marriage, as provided for in section 1 of Schedule 1 of the Bill.

⁵⁰ See <http://www.australianmarriageequality.com/employers.htm>.

⁵¹ Australian Marriage Equality is a national organisation working for equal marriage rights for all Australians regardless of their gender or sexuality. See <http://www.australianmarriageequality.com>.

⁵² See <http://www.australianmarriageequality.com/senatesubmission.htm>.

Recommendation No. 3:

The Australian Government should not follow the approach of the UN Human Rights Committee in *Joslin v New Zealand*. Instead, it should adopt the approach followed in jurisdictions such as South Africa and Canada that establish a right to marry, irrespective of a person's sexual orientation or gender identity.

Recommendation No. 4:

The Australian Government should afford legal recognition to same-sex marriages that have been lawfully contracted in another country. In this connection, it should repeal section 88EA of the Marriage Act, as provided for in section 5 of Schedule 1 of the Bill.

Recommendation No. 5:

All other provisions of the Marriage Act that discriminate on the grounds of sexual orientation or gender identity should be amended in accordance with the Bill.

Recommendation No. 6:

Should the Bill be enacted into law, the *Family Law Act 1975* (Cth) and other related laws should be amended to ensure that they are consistent with the reformed Marriage Act.