



BUILDING OUR COMMUNITY'S
HEALTH & WELLBEING

Submission to:

**Senate Legal and Constitutional
Affairs Committee on the *Marriage
Equality Amendment Bill 2009***

August 2009

About ACON

ACON (the AIDS Council of NSW) was formed in 1985 as a major part of the community response to the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON works to improve the health and wellbeing of the GLBT community and people with HIV, and reduce HIV transmission.

General comment

ACON welcomes the introduction of the *Marriage Equality Amendment Bill 2009*, and this inquiry. Marriage is a significant legal and social status for many Australians, however it is currently denied to couples in same-sex relationships. The discriminatory and exclusionary nature of the current definition of marriage is a serious concern to ACON and our community.

ACON has a holistic understanding of health, including the social determinants of health. Social exclusion as opposed to social inclusion and discrimination as opposed to equality are two social factors that negatively impact on health.¹ The current definition of marriage is neither socially inclusive nor equal.

Why is the recognition of marriage important?

For many people, marriage is central to the symbol of love and commitment that partners have for each other in a relationship. In an environment where Australians have similar rights under a de facto relationship, it is largely this symbolic element that drives many people to marry. Marriage declares the love of two partners as well as being an institution that confers legal rights and obligations to partners within that relationship. Marriage is also important in that it is a way to immediately create a legally and socially recognised relationship without the need for co-habitation or time restrictions.

People in same-sex relationships do not have access to the civil institution of marriage, and thus are excluded from a form of legal and social recognition of their relationship and commitment to each other. The importance of recognition to individuals and couples has been demonstrated through community consultation within the GLBT community.² However recognition is also important at a community level, as it functions as a statement that gay, lesbian, bisexual, and transgender people in same-sex relationships are accepted as equal citizens of Australia.³ The flow on effect of this legal statement would assist in the changing of homophobic or discriminatory attitudes in the Australian community, and to affirming to isolated and young members of the GLBT community that they are valued and equal members of Australian society.

The continuation of unequal laws has the reverse effect. It says to impressionable people, especially the young, that our government considers GLBT Australians to be of lesser value than other citizens and not worthy of the same rights. The way that is then

¹ Missing reference

² See *All Love is Equal... Isn't It? The recognition of same-sex relationships under federal law*, Gay and Lesbian Rights Lobby (NSW), (2007); and *Not Yet Equal*, Victorian Gay and Lesbian Rights Lobby, (2005).

³ *All Love is Equal... Isn't It? The recognition of same-sex relationships under federal law*, Gay and Lesbian Rights Lobby (NSW), (2007), p. 11.

interpreted by some people is “if it is alright for the government to discriminate against this group of people then it must be alright for me to do the same”. It then leads to the current high rates of discrimination in employment and the provision of goods and services that we know are experienced by members of the GLBT community. Sadly, we also know that it translates in harassment, abuse and violence.

Why is it more equal to recognise same-sex marriages?

Equality and non-discrimination are fundamental principles of Australian democracy and international human rights. The current definition of marriage discriminates against people who have a different sexual orientation or gender identity and results in an unequal recognition of relationships.

Sexual orientation and gender identity have already been recognised as protected grounds where discrimination is prohibited in many state and Commonwealth laws. The acceptance of gay, lesbian, bisexual and transgender people as full equal members of Australian society however is not complete, with the right to marry being one of the rights currently denied. As the *Marriage Act* 1961 currently stands, legally recognised marriages in Australia have to consist of one man and one woman, thus preventing same-sex attracted Australians from marrying someone of the same-sex.

Transgender individuals are in a complex situation depending on whether they have undergone gender reassignment surgery or not. Someone who has undergone gender reassignment surgery can marry their opposite sex partner, as the law recognizes their affirmed gender. For example, someone who has transitioned from male to female through surgery procedures is able to marry their male partner. However, if that transgender individual has not undergone gender reassignment surgery, even though she identifies as female, she is still considered a male and therefore cannot marry her male partner.

Thus for a transgender individual, the ability to marry their partner depends on whether they have or have not undergone gender reassignment surgery. Undergoing gender reassignment surgery is a significant personal decision that transgender people make themselves. To make this a requirement in order for someone to be legally recognised as their affirmed gender, and therefore to access marriage, is discriminatory.

The effect of denying marriage has symbolic implications that have been discussed above, but also tangible harmful effects. The lack of access to marriage prevents same-sex partners who do not qualify as a “de facto couple” from accessing family reunion visas. This has separated many same-sex couples or forced the Australian partner to leave his/her community and country.

International recognition of same-sex marriage

Many jurisdictions overseas have recognised the fundamental importance of equality as it applies to same-sex marriage. These jurisdictions share the common feature with Australia of defining themselves as progressive, liberal democracies which value the human rights of their citizens.

The Constitutional Court of South Africa in their landmark case on same-sex marriage stated:

A democratic, universalistic, 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. Equality means equal concern and respect across difference. ...what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.⁴

South Africa is not the only nation that has legalised same-sex marriage in recognition of equality. Belgium, Canada, the Netherlands, Norway, Spain and Sweden also allow marriage between two people of the same-sex. The states of Connecticut, Iowa, Maine, Massachusetts, New Hampshire and Vermont in the United States have also legalised same-sex marriage, while Israel, and the state of New York and the District of Columbia in the United States recognise same-sex marriages performed elsewhere.

What is the impact of same-sex marriage on children?

Children are important in many same-sex and heterosexual relationships and families. Like the diversity that exists between couples who are of the opposite sex, same-sex relationships include relationships with biological, adopted or no children. The different treatment by the government of denying the parents of these children the right to marry is not in the best interest of these children. Allowing same-sex marriages would enable these families to be recognised and regulated under the same Commonwealth framework that already exists to protect the best interest of children.

It is important to acknowledge that GLBT individuals can and do establish loving and committed families. These families are indistinguishable from families created by heterosexual individuals in their support, care and love within the family. To deny these families the equal respect and recognition as well as protections and regulations offered by the Commonwealth does not send the right message to children in these families and is not in the best interest of children.

How will marriage equality impact on religious freedoms?

Marriage as regulated by the Commonwealth government is above all a civil institution within the framework of a secular state. The protection of religious freedom is important in a secular state, however this protection does not equate to particular religious ideologies being imposed on all Australians regardless of their religion through law. The Commonwealth allowing same-sex marriages does not mean that ministers of religion are compelled to officiate or extend religious recognition to same-sex marriages.

It would not be appropriate for the Commonwealth government to use the majority's religious tradition as a guide for the rights of minorities. Doing so would fundamentally undermine the concept of equality and diversity as well as the separation between church and state.

It is important to note that the trend of religious acceptance of same-sex marriage is strengthening with more religious organisations accepting and blessing same-sex relationships including marriage. The Anglican Church in UK, Canada and the United States allow blessings of same-sex marriages and other same-sex relationships. Many Lutheran churches in Europe and America also allow blessings of same-sex marriages

⁴ *Minister for Home Affairs v Fourie*, (2005) [CCSA], paras 60-61.

and other same-sex relationships. Marriage equality would improve the freedom of religion for the religious organisations and churches that wish to bless same-sex marriages.

Why is civil unions not an adequate alternative?

Marriage and civil unions differ in fundamental ways, both practical and symbolic. One area of difference is that marriages are recognised and portable internationally, whereas civil unions are specific to certain jurisdictions and are not necessarily portable even between jurisdictions that have civil unions.

Civil unions are a separate institution that would be created specifically in the context of the GLBT community demanding equal access to marriage. Having civil unions would not confer the same degree of recognition that marriage would, and would not address the current discrimination where a section of the community are prevented from accessing marriage and thus be discriminated against on the basis of their sexual orientation. A separate institution for a community that demands equal access to a civil institution is not full equality.

Indeed to create a whole new category of relationship recognition just for same-sex relationships would institutionalise discrimination by cementing in law a hierarchy of relationships with the GLBT for all time at the bottom.

Conclusion

Marriage is significant to many Australians, regardless of their sexual orientation or gender identity. Marriage is something that many same-sex couples aspire to and demand, as a right that should be granted equally to them as to heterosexual couples. The continued denial of recognition and equality for same-sex couples is harmful to their children, their family, their community and Australia's social fabric as a free and democratic society that prides itself on the principles of equality and egalitarian fairness.

Recommendation:

The Senate Legal and Constitutional Affairs Committee and the two houses of Parliament support the *Marriage Equality Amendment Bill 2009*.