# Submission of the

# New South Wales Council for Civil Liberties

# and the

# University of New South Wales Council for Civil Liberties

# to the

# Senate Legal and Constitutional Committee's

# Inquiry into the Provisions of the

# Marriage Legislation Amendment Bill 2004

30 July 2004


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# 1. Executive Summary

Equality before the law, without discrimination, is a fundamental human right. The proposals currently before the Senate deny the inherent humanity of same-sex attracted people and the worth of their relationships. The Councils are concerned that these amendments are more about entrenching discrimination on the grounds of sexual orientation, rather than 'protecting' the institution of marriage.

The legislation is particularly disturbing in the context of the *Young* determination from the UN Human Rights Committee, in which Australia's federal laws were found to discriminate against gays and lesbians. The Councils believe that Parliament should be repealing laws that discriminate against same-sex attracted people, not introducing more discriminatory legislation.

While the Councils for Civil Liberties recognise that for some Australians the institution of marriage holds deep religious significance, the Councils do not believe that this is a relevant consideration for regulating the *secular* institution of civil marriage. No one is suggesting that religious institutions must recognise same-sex marriages. Indeed, the Councils would reject such a suggestion and spring to the defence of the right of citizens to practice their religion freely. However, Parliament is charged with regulating the *secular* institution of marriage, not the *religious* institution of marriage. The proposals before the Senate should not be justified on religious or moral grounds, particularly given the prohibition of section 116 of the Constitution.

The Councils do not accept the view that the constitutional and common law definitions of marriage are frozen in the nineteenth century. If they were, it is arguable that existing no-fault divorce laws would be unconstitutional. The traditional common law definition should be free of Parliamentary constraint and free to move with community values. Parliament should not pass this legislation and 'stop the clock' in the 1800s.

The Councils for Civil Liberties hope that it is plain to the Committee that, as a point of Constitutional Law, the Federal Parliament cannot define marriage, it can only regulate it. This is because "marriage" is a word that appears in the Constitution. The competent authority to interpret the words of the Constitution is the High Court of Australia.

This is highly significant, given that this legislation appears to be pre-emptively aimed at stopping the courts from redefining marriage in a non-discriminatory way – as a union between two people. The drafters of this legislation seem to fear that Australian courts will follow recent Canadian judgments, ruling that same-sex marriages should be recognised. If this is the aim of the proposals, then they will ultimately be ineffective because the Parliament cannot usurp the High Court's power to interpret the Constitution.

The Councils for Civil Liberties recommend that the legislation be rejected outright by the Senate. The legislation does not protect the institution of marriage, but rather discriminates against same-sex attracted citizens. The Parliament should be promoting human rights and equality before the law, not discrimination and inequality.

# 2. discrimination – not protection

The Marriage Legislation Amendment Bill 2004 ('the MLA Bill') seeks to codify an exclusively heterosexual definition of marriage, to deny recognition of foreign same-sex marriages and to hinder same-sex couples from adopting children overseas.

The Councils for Civil Liberties' primary concern with these proposals is that they discriminate on the grounds of sexual orientation.

The government claims that it is acting, as a matter of urgency, to defend the institution of marriage.[1] It is doing this by codifying a definition of marriage from 19th century Victorian England. That definition was coined in an era when women were the property of their husbands, when husbands could legally rape their wives, when divorce was fault-based and when children born out of wedlock were second-class citizens. None of these 19th century features of marriage are being 'defended' by the government. Only one feature is being 'defended': the discriminatory exclusion of non-heterosexuals.

The proposals are not about defending marriage, but rather about maintaining it as an exclusively heterosexual institution. The proposals are about discrimination, pure and simple. For this reason, it is disingenuous of the Prime Minister to claim that the proposals are not targeted at gay and lesbian Australians.[2] The proposals are squarely targeted at excluding same-sex couples from marriage and denying these Australians equality before the law, thereby demeaning their dignity and the worth of their relationships.

No rational reason is offered for this blatant discrimination. All that is put forward is that 'the vast majority of Australians' believe that marriage is exclusively heterosexual.[3] As the Canadian courts have acknowledged,[4] this amounts to circular reasoning: marriage is a heterosexual institution because only heterosexuals should be allowed to marry, and only heterosexuals should be allowed to marry because marriage is a heterosexual institution. The argument does not address the values that make marriage an important social institution[5] or attempt to explain why only heterosexuals can fulfil and enjoy these values.

The government has also stated that the MLA Bill will ensure that marriage will not become 'eroded by time'.[6] The Councils for Civil Liberties believe that recognising same-sex marriage will not erode the institution of marriage, but rather strengthen it by making it more inclusive.

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[1] Phillip Ruddock, 'Government defends marriage' (media release, 27 May 2004) 08/2004.

[2] 'Government mulls gay marriage restriction: Mr Howard was petitioned by 31 backbenchers', Australian Broadcasting Corporation (ABC) News, 27 April 2004.

[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29161 (Phillip Ruddock, Attorney-General). See also, Ruddock, n 1. Whether this is a valid claim or not is questionable: see, Emma-Kate Symons, 'Young-old rift on family value', *The Australian* (Sydney) 14 April 2004, 3 ('65% of under-35s, and almost 56% of respondents aged 35 to 49, say a same-sex couple with children is a family. In the over-65 age group that support drops to 14 per cent').

[4] *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [71].

[5] for example, commitment, stability, recognition, family, companionship and the raising of children in a stable and loving environment.

[6] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29161 (Phillip Ruddock, Attorney-General).

To talk of 'eroding' marriage is to set up the rights of heterosexuals in opposition to the rights of homosexuals – to say that if same-sex couples are allowed to marry then heterosexual couples will lose some of their rights. This is nonsense. 'Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples'.[7] Heterosexuals will continue to marry, continue to enjoy the benefits of marriage and continue to value their marriages. Nothing will change. No rights will be eroded. At its highest, same-sex marriage could only offend the moral sensibilities of those who believe that legal marriage and religious marriage should hold the same values.

What would change is that more Australians would be included in, and afforded the benefits and responsibilities of, the legal institution of marriage. Rather than being excluded, same-sex couples would have their human dignity and the worth of their relationships recognised by the law.

The Councils for Civil Liberties note with dismay that this is not the first time the Howard government has chosen to actively discriminate against same-sex attracted Australians. The federal government refuses to accept any referred power from the States over same-sex couples in relation to de facto property settlements.[8] Also, the government, by ignoring the UN Human Rights Committee's ruling in *Young* that Australian federal laws discriminate against same-sex couples, continues to support the operation of those discriminatory laws.

**The Councils for Civil Liberties recommend that the legislation be rejected outright by the Senate. The legislation does not protect the institution of marriage, but rather entrenches discrimination against same-sex attracted citizens.**

**Parliament should be promoting human rights and equality before the law, not discrimination and inequality.**

[7] *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [137].

[8] see New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2003 (Mr Newell): 2nd reading speech of *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW): 'This intransigence on the part of the Commonwealth in refusing to legislate in respect of same-sex couples is to be deplored and is clearly discriminatory'.

# 3. defining marriage

## 3.1 common law definition of marriage

Australian common law uses Lord Penzance's legal definition of marriage in *Hyde*: 'the voluntary union for life of one man and one woman, to the exclusion of all others'.[9]

The real question for the purposes of this inquiry is whether that definition, coined in 19th century Victorian England, is frozen in time to the extent that it excludes same-sex marriage in 21st century Australia.

The common law is 'judge-made' law and it changes over time. In the most recent Australian decision to review the common law definition of marriage, the Full Court of the Family Court expressed the opinion that 'it would be potentially highly destructive to the institution of marriage for its definition to be frozen at any point in time'.[10]

To support their view that contemporary marriage is very different from 19th century marriage, the Full Court of the Family Court cited this passage from the Law Commission of Canada:

> Women have achieved recognition of their independent legal personalities and equal political rights. Gender-neutral laws have replaced legislation that accorded different legal rights and responsibilities to husbands and wives. Contemporary family laws recognize marriage as a partnership between equals. Sexual assault within marriage and other forms of domestic abuse can give rise to criminal prosecution. Marriages are no longer legally indissoluble: the availability of no-fault divorce makes the continuation of a marital union a matter of mutual consent. The decision whether or not to procreate and raise children is an issue of fundamental personal choice. The heavy legal and social penalties imposed on non-marital cohabitation or children born out of wedlock have been removed. The law has had to recognize that children formerly known as 'illegitimate' are part of society – not recognizing their existence does not make them less so and fails to protect their basic interests.[11]

The *Hyde* definition of Victorian England has undergone radical changes to eliminate discrimination against women and children, in response to changing social norms. Marriage, defined as an exclusively heterosexual institution, is now undergoing similar scrutiny and change throughout the Western World.[12]

## 3.2 constitutional definition of marriage

It should be plain to the Committee that, as a point of Constitutional Law, the Federal Parliament cannot define marriage, it can only regulate it. This is because 'marriage' is a

[9] *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130. See also: *The Queen v L* (1991) 174 CLR 379, 391 (McHugh J).
[10] *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [80].
[11] *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [85], quoting the Law Commission of Canada, 'Beyond Conjugality: recognising and supporting close personal adult relationships' (2001) <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>.
[12] see 'The international experience' on page 11.

word that appears in the Constitution.[13] The competent authority to interpret the words of the Constitution is the High Court of Australia.[14] For Parliament to attempt to bind the courts by defining marriage is to violate the constitutional 'stream and source' doctrine.[15]

This is highly significant, given that the legislation now before the Senate appears to be pre-emptively aimed at stopping the courts from redefining marriage in a non-discriminatory way – as a union between two people.

The drafters of the MLA Bill seem to fear that Australian courts will follow recent Canadian judgments, ruling that same-sex marriages should be recognised. If this is the aim of the proposals, then they will ultimately be ineffective because the Parliament cannot usurp the High Court's power to interpret the Constitution.

So is the constitutional meaning of marriage frozen at Federation? The Full Court of the Family Court thought not, otherwise Parliament would only be restricted to regulating marriages within the 'monogamistic Christian tradition'.[16]

**The Councils for Civil Liberties do not accept the view that the constitutional and common law definitions of marriage are frozen in the nineteenth century. If they were, then it is arguable, for example, that existing no-fault divorce laws would be unconstitutional.**

## 3.3 legal and religious marriage are separate

It is important to distinguish between the legal institution of marriage and the religious institution of marriage. Prior to the 18th century in England, the state had little to do with marriage.[17] Marriage was defined by ecclesiastical authorities. However, by the mid-1850s the institution of civil marriage was well-established in England. The two types of marriage have been separate ever since.

While the Councils for Civil Liberties recognise that for some Australians the institution of marriage holds deep religious significance, the Councils do not believe that this is a relevant consideration for regulating the *secular* institution of civil marriage.

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[13] s 51(xxi): "The Parliament shall, subject to this Constitution, have power to make laws…with respect to…marriage".

[14] pursuant to s 76(i) of the *Constitution*, Parliament has conferred upon the High Court original jurisdiction 'in all matters arising under the Constitution or involving its interpretation': *Judiciary Act 1903* (Cth) s 30(a).

[15] *Australian Communist Party v Cth* (1951) 83 CLR 1, 258 (Fullagar J):

> [there is] an elementary rule of constitutional law which has been expressed metaphorically by saying that a stream cannot rise higher than its source. …The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.

See further: Leslie Zines, *The High Court and the Constitution* (1997, 4th ed) 219-248.

[16] *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [100].

[17] see *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94, [81], [83].

No one is suggesting that religious institutions must recognise and solemnise same-sex marriages. Indeed, the Councils would reject such a suggestion and spring to the defence of the right of citizens to practice their religion freely.

However, when, for example, the Roman Catholic Archbishop of Sydney, George Cardinal Pell, argues against same-sex marriage,[18] he is speaking of a religious normative view of marriage. He describes the marriage to which a religious person should aspire. He does not, however, have any special insight or competence to speak of civil marriage. Many Australians will disagree with his views on divorce, contraception, IVF and homosexuality.

**Parliament is charged with regulating civil marriage, not religious marriage. The proposals before the Senate should not be justified on religious or moral grounds, particularly given the prohibition of section 116 of the Constitution.**

## 3.4 legal definition of marriage is discriminatory

To the extent that the *Hyde* definition defines marriage as a union of one man and one woman, it discriminates against same-sex couples. This is a fact recognised by the Canadian courts.[19]

The Ontario Court of Appeal, for example, found that same-sex couples were discriminated against because they were denied access to marriage licences and registration and were excluded from the definition of marriage.[20] The court found that the common law definition demeans and offends the dignity of people in same-sex relationships.[21] In concluding that this discrimination is unjustifiable in a free and democratic society, the court held that there is no rational reason to maintain marriage as an exclusively heterosexual institution because same-sex couples are capable of raising families in a stable environment and providing each other with companionship – the very objectives of marriage.[22]

**The MLA Bill is discriminatory because it seeks to entrench the discriminatory common law definition of marriage.**

## 3.5 can Parliament pass discriminatory laws?

The Canadian cases hinge on the *Charter* guarantee of equality before the law. The Australian Constitution offers no such guarantee. Indeed an 'equal protection of the laws' clause was rejected by the Framers.[23] An implied Constitutional guarantee of legal equality has been rejected by the High Court.[24] This leaves the Commonwealth Parliament free to pass legislation, to its shame, that discriminates against same-sex attracted Australians.

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[18] George Pell, 'The case against gay marriage', *The Australian* (Sydney) 4 May 2004, 13.
[19] see 'Canada' on page 11.
[20] *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [69]-[71].
[21] *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [107].
[22] *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [127]-[132].
[23] George Williams, *Human Rights under the Australian Constitution* (1999) 37-8, 222.
[24] *Kruger v Cth ('Stolen Generations case')* (1997) 190 CLR 1; see analysis in Williams, n 23, 224-5.

This once again highlights the fact that, without a constitutionally-entrenched Bill of Rights, the rights and freedoms of all Australians are vulnerable to the whim of Parliament. All Australians are at risk of being discriminated against, in the same way that the government seeks to discriminate against gay and lesbian Australians in this Bill.

## 3.6 should Parliament pass discriminatory laws?

Despite its power to discriminate, the Councils for Civil Liberties believe that Parliament should think very seriously before passing discriminatory legislation. This is especially so without a Bill of Rights to protect Australians – in case Parliament gets it wrong.

**The traditional common law definition of marriage should be free of Parliamentary constraint and free to move with community values. Parliament should not pass this legislation and 'stop the clock' in the 1800s.**

## 3.7 some possible consequences of the Bill

Assuming that the constitutional marriage power extends to same-sex unions, then Parliament has the power to legislate on same-sex marriage.[25] It is somewhat of an irony that the Parliament depends on the marriage power including same-sex marriage, so that it can legislate to ban it.[26]

To take away an individual right, Parliament must legislate using 'unmistakable and unambiguous language'.[27] While the MLA Bill does not expressly ban same-sex marriage, it nevertheless appears to fulfil the intention of the government by limiting marriage to opposite-sex unions.

On the other hand, one possible repercussion of the MLA Bill not expressly stating that 'same-sex unions are banned' is that the High Court might interpret this as the Commonwealth vacating the field of same-sex marriage. This would leave the States free to issue same-sex marriage licenses.[28] Alternatively, the courts might choose to recognise cohabiting same-sex partners as living in common law marriages.

Of course, if the constitutional definition of 'marriage' does not include same-sex unions, then the MLA Bill has no effect other than to codify the exclusively heterosexual common law definition of *Hyde*.

[25] for a recent treatment of this topic see: Dan Meagher, 'The times are they a-changin'? – can the Commonwealth parliament legislate for same-sex marriage?' (2003) 17 *Australian Journal of Family Law* 135.
[26] Professor Horrigan, 'High Court stuck in the middle on gay marriages', *Canberra Times* (Canberra) 3 June 2004, 17.
[27] *Coco v The Queen* 91994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron & McHugh JJ).
[28] s 51(xxi) is a concurrent power, shared by the Commonwealth and States, not an exclusive power of the Commonwealth Parliament.

# 4. the legislation is not urgent

The Councils for Civil Liberties believe that the government's assertions that the Marriage Legislation Amendment Bill 2004 ('the MLA Bill'), taken as a whole, is of particular urgency are overstated and misleading – both as a matter of public policy and legal consideration.

The Australian media have reported that at least one same-sex couple in Melbourne, who went to Canada to get married, are preparing to launch a case in the federal courts to have their foreign marriage legally recognised.[29]

The federal Attorney-General cited potential judicial recognition of same-sex marriages in other countries as the origin of the urgency of the government's marriage Bills:

> …I want to make it very clear that the reason for this, without breaching any privacy matters, is that some parties have already sought recognition of offshore arrangements approved under the laws of other countries and would be seeking recognition under our law.[30]

There is strongly expressed opinion that the judicial outcome feared by the government as needing redress is indeed relatively unlikely.[31]

Nothing in either the Explanatory Memoranda, or the presentation of these Bills to Parliament, has established a credible logical reason why a legislative attempt to interfere in the outcome of these court cases is needed as a matter of public policy.

The government has also consistently failed to explain why this matter should be accorded a degree of urgency exceeding other matters of genuine importance, for example health, education and national security.[32]

In late June 2004, the government attempted to force Schedule 1 of the MLA Bill through Parliament.[33] The Marriage Amendment Bill 2004 ('the MA Bill') essentially reproduced the contents of Schedule 1 of the MLA Bill relating to the definition of marriage in the *Marriage Act 1961* (Cth), but did not include the provisions regarding adoption provided for in Schedule 2 the MLA Bill. This strongly suggests that the government does not perceive the provisions regarding adoption contained in Schedule 2 of the MLA Bill as being of any particular urgency.

These two Bills seek to entrench the government's particular perspective on the institution of marriage specifically, and on notions of the family and sexuality generally. The Bills amount to legislative discrimination on the basis of sexual orientation. This is reinforced by the government's insistence that the proposals are urgent.

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[29] Farah Farouque, "Gay 'husbands' To Test Their Marriage In Court", *The Age* (Melbourne), 4 February 2004, 3.

[30] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31460 (Phillip Ruddock, Attorney-General).

[31] e.g. Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31461 (Nicola Roxon, Shadow Attorney-General): '[the] two applications…are 99.9 per cent likely to be rejected by the courts'. See also: Farouque, n 29, quoting Professor Regina Graycar (Sydney University).

[32] e.g. Roxon, n 31, 31461-2.

[33] The Marriage Amendment Bill 2004 was introduced into, and passed by, the House of Representatives on 24 June 2004. The Senate has not passed the Bill.

These changes were originally announced along with promises to reform superannuation law to recognise same-sex couples. According to the Attorney-General, those reforms 'will be introduced in another place at an appropriate time'.[34] In other words it is urgent to exclude same-sex couples from marriage, but not urgent to afford them equality in superannuation law.

This demonstrates that the government is in a hurry to *institute* discrimination against gay and lesbian citizens, but in no hurry at all to *end* discrimination against them.

**The Councils for Civil Liberties believe that Parliament should give priority to <u>ending</u> discrimination against same-sex attracted people in federal law, rather than giving priority to introducing new forms of discrimination.**

[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29162 (Phillip Ruddock, Attorney-General).

# 5. The international experience

In Canada, where civil rights are protected by the *Canadian Charter of Rights and Freedoms*, several provincial courts have ruled that as matter of equality before the law same-sex marriages must be recognised. The Canadian government has announced national legislation to reflect this.

There have been moves in the United States to head off any similar recognition of equality by American courts. The MLA Bill appears to be mimic this American concern.

## 5.1 Canada

The Canadian federal government is currently considering legislation to recognise same-sex marriage for civil purposes. This follows recent court decisions that changed the common law definition of marriage from the 'union of one man and one woman' to the union of 'two persons' in three provinces: British Columbia, Ontario and Quebec.[35]

These courts held that the dignity and equality rights of people in same-sex relationships are violated by the exclusion of same-sex couples from the legal institution of marriage. The common law definition of marriage was found to be discriminatory and unjustifiable in a free and democratic society.[36] The definition was held to be unconstitutional for contravening the *Canadian Charter of Rights and Freedoms*,[37] and was amended to become the 'union of two persons'.

In *EGALE v Canada (Attorney General)*, the British Columbia Court of Appeal remarked that there had been a marked change in public attitudes and public policy towards marriage and same-sex marriage since Confederation.[38] In this vein the Canadian Attorney-General's Department has reported that in the 21st century, 'marriage can include same-sex couples who want to unite in the institution and whose unions share in the current understanding of the essence of marriage, including in some cases the rearing of children'.[39]

## 5.2 New Zealand

### *5.2.1 current legal status*

In New Zealand law, in certain legal areas, same-sex couples have de facto status equivalent to that of opposite-sex couples.

Despite this (partial) recognition of same-sex relationships, same-sex couples cannot marry. In 1998, the New Zealand Court of Appeal held that the *Marriage Act 1955* (NZ) applies to marriage between a man and a woman only and that this does not constitute

[35] respectively: *EGALE Canada v Canada (Attorney-General)* (2003) 13 BCLR (4th) I (CA), [159]; *Halpern v Canada (Attorney-General)* (2003) 65 OR (3rd) 161 (CA), [148]; and, *Hendricks v Québec (Procureur général)* [2002] RJQ 2506 (Superior Court), [200].
[36] eg, *Halpern*, n 35, [108] & [142].
[37] section 15(1): equality before the law.
[38] *Egale*, n 35, [178].
[39] Attorney General of Canada, 'In the Matter of a Reference by the Governor in Council Concerning the Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes' (factum), Order in Council p.c. 2003-1055 (16 July 2003), 11.

discrimination.[40] It has been suggested that that decision has been overtaken by the 2001 amendments to the *Human Rights Act*.[41] The *Human Rights Amendment Act 2001* requires that New Zealand government activities be subject to the anti-discrimination standards set out in section 19 of the *New Zealand Bill of Rights Act 1990* and section 21 of the *Human Rights Act 1993*. Prohibited grounds of discrimination include sexual orientation.

The New Zealand government has acknowledged that the lack of legal and/or social recognition of same-sex relationships has the effect of treating bisexual, lesbian and gay people as second-class citizens. It denies their relationships dignity, and impacts negatively on self-esteem, health and relationship stability.[42]

With the double aim of rectifying this unjustified lack of recognition of stable and committed relationships and bringing government activities into compliance with the anti-discrimination standards required by the *Bill of Rights* and *Human Rights* Acts, two sets of legislative changes have been proposed: the Civil Union (Statutory References) Bill; and, the Relationships (Statutory References) Bill.

### 5.2.2 Civil Union (Statutory References) Bill

The Bill provides for civil union in New Zealand – for both different- and same-sex adult relationships – that is equivalent to marriage. It sets out the requirements and processes to enter or dissolve a civil union, and for the appointment of celebrants.

The provisions of the proposed Bill will be modelled on equivalent provisions in the *Marriage Act 1955*,[43] subject to some changes to reflect current law, policy, and practice.

Significantly however, formal recognition of a relationship through marriage will remain available only to opposite-sex couples.

### 5.2.3 Relationships (Statutory References) Bill

Discrepancies in 160 Statutes and Regulations have been identified in the law pertaining to couples in committed, exclusive and stable relationships depending on whether they are married or not. Some of these discrepancies favour married couples, others (for example tax and social security legislation) favour unmarried couples.

The Relationships (Statutory References) Bill has been drafted in order to give practical effect to the anti-discrimination measures initiated by the Civil Union Bill, and in order to bring New Zealand legislation in line with the *New Zealand Bill of Rights Act 1990* and *Human Rights Act 1993*.

Accordingly, regardless of the sex and sexual orientation of the partners, the Bill standardises the legal rights and responsibilities for married, de facto and civil union relationships.[44] All three types of relationship will have identical rights, responsibilities and protections.

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[40] *Quilter v Attorney General* [1998] 1 NZLR 523. For commentary see: Andrew Butler, 'Same-sex marriage and freedom from discrimination in New Zealand' (1998) *Public Law* 396.
[41] Paul Rishworth, 'Human Rights' (2003) 2 *New Zealand Law Review* 261, 271.
[42] Cabinet Policy Committee, 'Government Civil Union Bill', POL (03) 117 (13 May 2003), <http://www.courts.govt.nz/pubs/reports/2004/civil-union-bill/cab-paper-1.html> at 27 July 2004.
[43] Cabinet Policy Committee, n 42.
[44] NZ Ministry of Justice, <http://www.courts.govt.nz/pubs/reports/2004/civil-union-bill/index-relationship.html> at 27 July 2004.

### *5.2.4 comments on the proposed legislative changes*

While marriage, civil union and de facto relationships will *legally* have identical rights, responsibilities and protections, same-sex couples will only have access to civil union and de facto status. They will not be granted the right to marry.

Even though the law will have complied with current understandings of New Zealand and international human rights instruments (i.e. that marriage is a relationship between and man and a woman), a question remains as to whether the goals of anti-discrimination would be fully met by the proposed changes.

The New Zealand Cabinet is clearly aware of the fact that the three sorts of relationship are *socially* understood as qualitatively different.[45] It can well be argued that the refusal to allow same sex-couples legal access to the social status of a legal relationship named 'marriage' is a form of discrimination, compounded by the fact that the fee for civil union registration will likely be higher than the fee for marriage registration.[46]

## 5.3 other Western nations

Canada is not the only nation in the world to include same-sex marriages in the definition of marriage.

In 2001, the Netherlands became the first country to 'open up' the civil institution of marriage to same-sex couples. In June 2003, Belgium did the same. Both countries effected this change to their civil definitions of marriage by amendments to their respective Civil Codes. Both Codes now provide, quite simply, that a marriage can be contracted by two people of different sex or of the same sex.

Seven other European countries have enacted other legal institutions to formally recognise same-sex relationships, including Germany, which has a Registered Domestic Partnership scheme.[47]

[45] Cabinet Policy Committee, n 42.
[46] Cabinet Policy Committee, n 42.
[47] see Dierk Ullrich, 'The German Federal Constitutional Court on same-sex life partnerships and same-sex marriage: comparing apples with oranges' (2003) 20 *Canadian Journal of Family Law* 179.

# 6. International Law

## 6.1 recognition of same-sex marriage

In 2002, in the case of *Joslin v New Zealand*, the United Nations Human Rights Committee found that the failure of the New Zealand *Marriage Act* to provide for same-sex marriage was not a violation of the *International Covenant on Civil and Political Rights* ('the ICCPR').[48] The Committee considered that mere refusal to provide for marriage between same-sex couples was not a violation of the ICCPR, because Article 23 of the ICCPR describes the right to marry specifically in terms of 'men and women' rather than the general terms used elsewhere in the Covenant.[49]

It should be remembered that international human rights law sets *minimum* standards to be maintained. There is nothing to stop more protection being afforded to same-sex couples, as in Canada, the Netherlands, Belgium and Massachusetts.

It is also significant that *Joslin* was not decided on discrimination grounds. International human rights law states that sexual orientation is a prohibited ground of discrimination.[50] Such discrimination is only permitted if 'it is based on reasonable and objective criteria'.[51] As more and more countries acknowledge that excluding same-sex couples from the institution of marriage is discriminatory and consequently legislate to recognise same-sex marriages domestically, it is conceivable that 'the right of men and women of marriageable age to marry'[52] will, in the near future, come to incorporate same-sex couples in international human rights law.

## 6.2 recognition of foreign same-sex marriages

Pursuant to Article 9 of the *Hague Convention on the Celebration and Recognition of the Validity of Marriage 1978*, Australia has an obligation to recognise a marriage 'validly entered into under the law of the State of celebration'. In 1986, Part VA was inserted in the *Marriage Act 1961* (Cth) to give effect to Ch II of the Convention. Consequently, Australia must recognise a marriage celebrated in a foreign nation where it was valid in that nation.[53]

Same-sex marriage is not one of the permissible Article 8 exclusions from Australia's obligations under the Convention. It is also not included in the circumstances in which a Contracting State may refuse to recognise the validity of a marriage in Article 11.

The Convention does not define marriage, but the rapporteur states that it means the institution of marriage in its 'broadest, international sense'.[54] This means that national or

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[48] *Joslin v New Zealand* (2002), UN Human Rights Committee, Communication No. 902/1999 (17 July 2002) CCPR/C/75/D/902/1999.
[49] *Joslin v NZ*, n 48, [8.2]-[8.3].
[50] *Toonen v Australia* (1994), UN Human Rights Committee, Communication No. 488/1992 (4 April 1994) CCPR/C/50/D/488/1992.
[51] *Young v Australia* (2003), UN Human Rights Committee, Communication No. 941/2000 (12 August 2003) CCPR/C/78/D/941/2000, [10.4].
[52] ICCPR Article 23(2).
[53] *Marriage Act 1961* (Cth) s 88D, also s 88E by which a marriage solemnised in a foreign country that would be recognised under the common law rules of private international law but is not required to be recognised under the Convention shall be recognised in Australia.
[54] Department of Parliamentary Services, 'Marriage Legislation Amendment Bill 2004' Bills Digest No. 155 2003-04, 6.

domestic definitions should be transcended. In this way, polygamous marriages solemnised in foreign countries are recognised in Australia.

However, this does not mean that the definition of any State would have to be recognised by Australia. There must be 'an acceptance transcending a particular national system that a particular relationship constitutes a marriage'.

Writing in 2002, Peter Nygh did not think same-sex marriage had attained that level of acceptance.[55] However, there have been significant subsequent acceptances of same-sex marriage in Canada, the USA, the Netherlands and Belgium. This means that the level of international acceptance of same-sex marriage is rapidly changing.

[55] Peter Nygh, 'The consequences for Australia of the new Netherlands law permitting same gender marriages' (2002) 16 *Australian Journal of Family Law* 139.