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The Secretary
Senate Standing Committee on Legal and Constitutional Affairs
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**Senate Standing Committee on Legal and Constitutional Affairs
Inquiry into the Marriage Equality Amendment Bill 2009**

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Liberty Victoria submission

to the

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Marriage Equality Amendment Bill 2009

1. Introduction

- 1.1 The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia’s compliance with the rights and freedoms recognised by international law. Liberty’s contribution is well known to Senate and House committees, and we have campaigned extensively in the past on issues concerning human rights and freedoms, equality, democratic processes, government accountability, transparency in decision-making and open government.
- 1.2 Liberty commends Senator Hanson-Young on her bill, whose goal of removing discrimination against same-sex couples from the *Marriage Act* 1961 is one we wholeheartedly endorse.
- 1.3 Liberty urges the Senate to pass the bill, subject to some amendments detailed below in the section “Notes on the drafting”.

2. Civil or religious?

- 2.1 Marriage in Australian law is a civil partnership or civil union.
- 2.2 It is established by an Act of the Commonwealth Parliament, the Marriage Act 1961 (Cth), and is governed by that Act and the Family Law Act 1975 (Cth).
- 2.3 Marriage is not a religious institution. What religions do about it is up to them and not regulated by Australian laws, generally speaking.
- 2.4 Most marriages in Australia are formalized by civil celebrants appointed under the Family Law Act.
- 2.5 That Act also permits some authorized officials of approved religious bodies to act as civil celebrants in addition to or simultaneously with conducting their own rituals.
- 2.6 In many European countries religious bodies have no role at all in civil marriage: all marriages, to be lawful, are conducted by civil officials. Religious rituals, if any, come later.
- 2.7 Liberty Victoria commends this arrangement to the Committee, and urges that it recommend that the same separation of church and state should be given effect in Australia.

3. Overseas marriages

- 3.1 Marriages lawfully conducted in other jurisdictions are recognized as marriages in Australia, at least for some purposes. This is true even if, as in the case of polygamous marriage under the laws of the Kingdom of Saudi Arabia among others, the marriage could not be conducted in Australia under Australian law. Australia is obliged to recognize valid foreign marriages under the *Convention on Celebration and Recognition of the Validity of Marriages* signed at The Hague on 14 March 1978 (the "*Hague Convention*"). In 2004 Australia breached its obligations under that treaty by amending the *Marriage Act* to prohibit the recognition of certain valid foreign marriages, namely those between two men or between two women.
- 3.2 Such marriages, at present not recognized in Australia in defiance of Australia's treaty obligations, are today validly contracted in many countries: Canada, the Republic of South Africa, Spain, Belgium, the Netherlands, Norway, Sweden and the United States of America (states of Massachusetts, Connecticut, Maine, New Hampshire, Vermont and Iowa at least, while New York recognizes other States' valid marriages and has very recently passed a bill through its lower house to remove the current discrimination from its local definition of marriage).
- 3.3 Article 5 of the *Hague Convention* provides that the "application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the State of celebration". The response generated from the broad community at the time the 2004 Bill was introduced demonstrates that the Howard Government's views were not unanimously supported by the whole community. Even five years ago, therefore, it could not be said that the recognition of same sex marriages in Australia was "manifestly incompatible" with public policy. The most recent opinion polls (below) merely reinforce this conclusion.

4. No valid reasons

- 4.1 As was very recently held by a unanimous decision of the Supreme Court of the state of Iowa in the USA¹, there are no valid reasons in a jurisdiction which respects the right to the equal protection of the laws and equality under law to deny access to the institution of marriage to same-sex couples.
- 4.2 It is sometimes said in support of the discriminatory law adopted in 2004 that it "reflects the widely held view in the community that marriage is between a man and a woman". This assertion is spurious. It merely panders to prejudice.

¹ *Varnum v. Brien*, 763 N.W.2d 862, (Iowa 2009) (filed 3 April 2009, effective 27 April 2009)

- 4.3 It is plainly wrong for the countries named above. It is wrong for a majority of Australians. The most recent Galaxy Poll, in June 2009, showed that support for equal marriage laws is growing:
- 4.3.1 Three in five (60%) of Australians agree that same sex couples should be able to marry in Australia (27% strongly agree, 34% agree). This is higher than the 36% who disagree.
- 4.3.2 Equality is better supported by females (68%) than males (53%). Australians aged 16-24 years (74%) are more likely to agree than those aged 25-34 years (71%), 35-49 years (68%) or 50 years and over (45%). Those who vote for the Greens (82%) or the ALP (64%) are more likely to agree than Coalition voters (50%).
- 4.4 Nearly two years ago, in June 2007, the Galaxy Poll found that “a majority of Australians support gay marriage – 57% of Australians agree that same-sex couples should be able to marry. The right to marry also garners overwhelming support among younger voters... 69% of those 16–24 and 72% of those 25–34 agree that same-sex couples should be allowed to marry, compared with only 27% of each group in disagreement.” It found a growing tide in favor of marriage equality, contrasting this poll with a similar Newspoll in 2004 which showed only 38% in favor of equality. In December 2008 the Galaxy Poll found even in Queensland that a 54% majority of “Queenslanders agree that same sex couples should be able to marry (21% strongly agree, 33% agree)”.
- 4.5 The major objection to equal marriage comes from religious groups who declare that the form of marriage recognised by God and thus the only legitimate form is that between a man and a woman. Such a marriage is in fact not endorsed by the Bible. The norm in biblical marriage is polygamy and not a monogamous relationship between one man and one woman. Resorting to religion as a basis for prejudiced marriage practices belies the fact that the Christian religion does not mandate or support the form pushed by Christian groups today. Indeed, in examining marriage practice there is no indication that Christianity or religion has a positive impact on marriage. Statistics in the US on divorce rates demonstrate unequivocally that the red states (religious or bible-belt states) have a much higher divorce rate than the northern blue states. Indeed the state with the lowest divorce rate is Massachusetts, home to John Kerry, the Kennedys and same-sex marriage.²

5. Equality, not discrimination, is the “widely held view”

- 5.1 Contrary to the position quoted above, the opinion poll data shows it is actually “widely held view” that marriage should be open to two men, or

² Pam Belluck, ‘To Avoid Divorce Move to Massachusetts’, *New York Times*, 14 Nov 2004, <http://www.nytimes.com/2004/11/14/weekinreview/14pamb.html>, - the red states also have a higher homicide, teenage pregnancy, drug abuse, and suicide rate than the blue liberal states.

two women, as it is to a man and a woman. This view is more “widely held,” indeed, than the view expressed last election that Kevin Rudd should be PM.

- 5.2 The ALP’s 2009 National Platform says (chapter 7, paragraph 2):

We have always stood for equality. Throughout our party’s history successive Labor governments have sought to achieve this by helping people overcome disadvantages based on social class, gender, sexual orientation, disability, religion, cultural background and racial prejudice. We have always pursued the fair go, tolerance and respect. We oppose all attempts to divide Australians by pandering to prejudice.

- 5.3 Senator Hanson-Young’s bill does genuinely reflect the widely held view in the community that marriage should be between two people, not merely a man and a woman. This is unlike the *Marriage Act*, with its 2004 amendments best characterized, in the ALP policy document’s words, as merely “pandering to prejudice.”

6. Civil Unions Not the Answer

- 6.1 As noted above, marriage is itself a civil union, though with a particular history, or cultural baggage. Whether a second institution without that history should be created—as in New Zealand, or like the systems of relationship registration in Tasmania, Victoria and the ACT—is a separate question.

- 6.2 The introduction of such a system will not displace the need for marriage equality. If marriage is not available, then a “marriage-lite” civil union scheme is just another “seat at the back of the bus.” It is only a genuine option if it is a genuine choice. So marriage equality comes first.

- 6.3 Any attempt to introduce a civil union scheme as a second tier marriage option is pointless until marriage equality is done. When all couples can marry, as Senator Hanson-Young’s Bill would ensure, then an alternative system for those who do not want the historical associations of marriage will be worth creating. While marriage remains discriminatory, any attempt to fob off the call for equality with an inevitably second-rate pseudo-marriage will fail. Several such experiments in the United States have demonstrated this clearly, with the Courts coming back and saying that the civil union schemes did not satisfy the equal protection of the laws requirement of their constitutions, and insisting on marriage equality. “Separate but equal” is not equal.

7. Wider significance

- 7.1 More important than all these arguments, however, is the symbolism.
- 7.2 Marriage is eulogized as a fundamental, and vital, institution of society. Its foundation, indeed, some say. The deliberate exclusion of lesbians and gay men from this fundamental institution is therefore a denial of more than just membership of some old club: it is a denial of their citizenship, indeed of their humanity.
- 7.3 The symbolism therefore has real, and harmful, consequences.

- 7.4 For same-sex-attracted young people—especially those just becoming aware of their sexual orientation, and so at their most vulnerable and without supports—the subtle and complex details of the 84 Acts so admirably amended recently to end same-sex couple discrimination in tax, superannuation, immigration etc are invisible. What is only too visible is the door slammed shut.
- 7.5 Exclusion from marriage sends society’s strongest message to same-sex-attracted youngsters: you are unworthy!
- 7.6 This message of exclusion harms young people directly, reinforcing the prejudice that leads to heightened risk of depression and suicide. And it harms them indirectly, by making it harder for parents to be supportive, and easier for fellow school students to exhibit and act on prejudice.
- 7.7 The Committee should refuse to be part of this cycle of abuse. It should send the decent message, the right message: marriage is for every couple who have a mutual commitment to a shared life.
- 7.8 **If marriage is important, marriage must be for all, with no discrimination.**

Notes on the drafting

- 1 In the concluding remarks of her second reading speech Senator Hanson-Young rightly says that the Government must “start sending the message that all Australians are to be treated fairly and equally, regardless of their sexual orientation.” The terminology of this sentence is the terminology that should be used in the bill throughout.
- 2 We urge the Committee and Senator Hanson-Young to amend the bill to use throughout the clear and well-accepted term “sexual orientation” rather than the broader, and therefore ambiguous and poorly focussed, term “sexuality”. We append a discussion of the reasons for this terminology at the end of this submission.
- 3 Section 1 of the bill’s Schedule replaces the definition of marriage, making three changes. The first we endorse, namely to replace “a man and a woman” with “two people.”
- 4 The second is to insert a non-discrimination phrase, namely “regardless of their sex, sexuality or gender identity,” whose intention we endorse (subject to replacing “sexuality” with “sexual orientation”) but which we submit would be better placed as a separate sub-section: “5(4) In this section a reference to a person or to people must be interpreted to include a person or people regardless of their sex, sexual orientation or gender identity.”
- 5 The third change is the omission of the words “to the exclusion of all others.” This omission raises a different set of issues, and would in our submission be better dealt with on another occasion, as it is not germane to the ending of discrimination. We would restore the omitted words to the definition of marriage in this bill.

- 6 Sections 2 and 4 of the Schedule, replacing s.45(2) and s.72(2), are unnecessary and should be omitted. The words “or words to that effect” in the current *Marriage Act* suffice to allow the couple to write their own words, in the same way that the bill’s new wording proposes. The use of the words “husband” and “wife” in the current sections is not discriminatory, since they are both available as the case requires.
- 7 Section 3 of the Schedule is fine if the above changes are made, as it leaves the celebrant reciting the definition Liberty proposes, rather than the definition now included in the bill.
- 8 We heartily endorse section 5 of the schedule, and also endorse section 6.

Appendix – Sexual Orientation

a “Sexual orientation” is appropriate, clear and unambiguous, unlike “sexuality,” whose primary meaning is not the one being appealed to in this bill.

b Consider the dictionary definitions:

The *Macquarie Dictionary* (1981) defines sexuality as “1. Sexual character; possession of sex. 2. The recognition or emphasising of sexual matters.”

The *Oxford Dictionary* (2nd edition, 1989) gives “1. The quality of being sexual or having sex. 2. Possession of sexual powers, or capability of sexual feelings. 3. Recognition of or preoccupation with what is sexual; ... 4. Appearance distinctive of sex.”

Notwithstanding the use of the term in some Australian jurisdictions,³ it is hard to see any value in its use, given that it seems to emphasise sex, while the discrimination suffered by lesbians and gay men mostly relates to the *direction* of a person’s (perceived) emotional or sexual feelings. That is what *sexual orientation* emphasises, which is why it is preferable.

c “Sexual orientation” is the term used in international law, and in particular in the interpretation of the *International Covenant on Civil and Political Rights* (ICCPR) by the Human Rights Committee of the United Nations. In the communication of *Young v Australia*,⁴ it expressed the view that Australia “has violated article 26 of the Covenant by denying [Mr Young] a pension on the basis of his sex or sexual orientation”⁵. In its reasons the Committee also referred to “its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation”, citing *Toonen v Australia*⁶.

³ South Australia, the Territories and Queensland.

⁴ CCPR/C/78/D/941/2000 (12 August 2003)

⁵ *Ibid*, Para 10.4

⁶ Human Rights Committee, Case No. 488/1992, Views adopted on 31 March 1994.

- d This usage in the interpretation of the ICCPR is particularly relevant to this bill, as to all Commonwealth legislation, as the power to legislate in this manner derives principally, via the external affairs power in the Constitution, from the ICCPR, whose article 26 requires and empowers Australia to legislate for equality before and under the law. The authoritative interpretation of Article 26 as including a ban on “sexual orientation” discrimination cannot be ignored.
- e “Sexual orientation” is also the term used in the laws of Victoria, Tasmania, and Western Australia.