



THE LAW SOCIETY
OF NEW SOUTH WALES

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21 March 2012

Ms Margery Nicoll
Acting Secretary-General
Law Council of Australia
DX 5719 CANBERRA

By Email: rosemary.budavari@lawcouncil.asn.au

Dear Ms Nicoll,

Senate Inquiry into the Marriage Equality Amendment Bill 2010

Thank you for your invitation to contribute to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into Senator Hanson-Young's *Marriage Equality Amendment Bill 2010* (the "Bill").

The Human Rights Committee ("HRC") and the Family Issues Committee of the Law Society of NSW have both considered your memorandum dated 14 February 2012 as well as the Bill.

The HRC's view is that when considering an amendment to the *Marriage Act 2004* (Cth) to allow same-sex marriage, the most appropriate principle to apply is the key human rights principle of equality. This approach is one that is consistent with Australia's international human rights obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR sets out that:

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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In *Toonen v Australia*¹, the UN Human Rights Committee expressed its view that the reference to "sex" in Article 26 is to be taken to include sexual orientation. In *Young v Australia*, the UN Human Rights Committee found that Australia violated Article 26 by denying Mr Young "a pension on the basis of his sex or sexual orientation."² The Committee's view is that if civil marriage is recognised only between opposite-sex couples, it is strongly arguable that this amounts to discrimination against same-sex

¹ (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7]

² *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, [10.4]

couples on the basis of sexual orientation and therefore a violation of Article 26 of the ICCPR.

The HRC submits that the *Marriage Act 2004* should be amended to allow same-sex couples to marry in order for Australia to properly uphold its international obligations. Further, the discriminatory references to “man”, “woman”, “husband” and “wife” should be removed and replaced with non-gender specific terms. The Committee submits also that same-sex marriages performed lawfully in other jurisdictions should (subject to s88D of the *Marriage Act*) be recognised in Australia.

The HRC echoes the point made by the Australian Human Rights Commission that recognising the right to enter into civil marriage for all Australians does not restrict any other human right. The Committee’s view is that allowing civil marriage does not interfere with the right of religious individuals or organisations to refuse to perform ceremonies inconsistent with their religious beliefs.³

Finally, the HRC notes that Australia would not be by any means the first jurisdiction to remove discrimination against same-sex couples by allowing same-sex marriage. Jurisdictions such as Canada, South Africa, Spain, Sweden, Netherlands, Iceland, Norway, several states in the United States, Argentina and Portugal allow same-sex marriage.

The Family Issues Committee agrees with the HRC’s views in support of the Bill. Further, it also wishes to express support for the Bill on the basis of a perceived shift towards greater acceptance of the diversity of family structures within the Australian community, and the likely benefits that recognition of same-sex marriages will have for children born to same-sex couples. Additionally, the Family Issues Committee highlights the desirability of congruence in permitting same-sex marriages within Australia, where the Australian Government currently issues a “Certificate of No Impediment to Marriage” to Australians who wish to enter into a same-sex marriage in an overseas jurisdiction.

Thank you once again for the opportunity to comment.

Yours sincerely,



Justin Dowd
President

³ Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 10 September 2009 at p 8. Available online: http://www.hreoc.gov.au/legal/submissions/2009/20090910_marriage_equality.pdf (Accessed 20 January 2012).