



26 August 2009

Peter Hallahan  
Committee Secretary  
Senate Legal and Constitutional Committee  
Parliament House  
CANBERRA ACT 2600

By e-mail: legcon.sen@aph.gov.au

Our Ref: PRO09-6104

Dear Mr Hallahan

### **Inquiry into the Marriage Equality Amendment Bill 2009 (Cth)**

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

### **PIAC's defence of lesbian, gay, transgender and intersex people's human rights**

PIAC has promoted and defended the human rights of gay, lesbian, transgender and intersex people principally through representing plaintiffs in vilification and sexuality discrimination claims in New South Wales.

PIAC acted in the first case for homosexual vilification on behalf of its client Mr Gary Burns against radio personalities Mr Steve Price, Mr John Laws and

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Radio 2UE<sup>1</sup> in relation to comments made about a gay couple appearing on the television show, *The Block*. PIAC is presently acting for Mr Burns in relation to his more recent homosexual vilification claim against The Hon Jeff Kennett in relation to public comments he made in July 2008 about a football club's sacking of a masseuse in which he is alleged to have equated the masseuse's bisexuality with the crime of paedophilia.

PIAC has successfully defended the right of gay couples to access foster care services provided by religious bodies in NSW.<sup>2</sup> In that case, PIAC's clients' application to become foster parents was refused by Wesley Mission, the defendant to their claim of sexuality discrimination. In its defence, Wesley Mission claimed that its discriminatory conduct fell within a 'religious bodies' exception. The Administrative Decisions Tribunal found that Wesley Mission was not entitled to rely on the exception. In spite of the discriminatory rejection by Wesley Mission, PIAC's clients have become foster parents through another (also religious) agency. The case is currently the subject of an appeal brought by Wesley Mission.

### **The Committee should support the Bill**

PIAC urges the Senate Committee to recommend passage of Senator Hanson-Young's Marriage Equality Amendment Bill 2009 (the Bill). Through its clients' experiences, PIAC is familiar with the stigma, vilification and unlawful discrimination that gay men, same-sex couples, and families led by same-sex couples experience every day. This experience demonstrates that same-sex couples do not fully enjoy protection and fulfilment of their human right to equality before the law.

The Federal Government has shown its support for the human rights of same-sex couples by amending not only the 58 discriminatory federal laws identified in the Human Rights and Equal Opportunity Commission (HREOC) (as it then was) report, *Same Sex: Same Entitlements*<sup>3</sup>, but a further 26 discriminatory laws impacting on same-sex families. PIAC congratulates the Government for its leadership in the recognition and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people.

### **The Marriage Legislation Amendment Act 2004 (Cth)**

The current Government's approach to the human rights of lesbian, gay, bisexual, transgender and intersex people can be contrasted with that of the previous Federal Government. In 2004, the Federal Parliament amended the *Marriage Act 1961* (Cth) (the Marriage Act) by passing the *Marriage Legislation Amendment Act 2004* (Cth) (the Marriage Amendment Act).

The Marriage Amendment Act introduced two new provisions to the Marriage Act. Firstly, it entrenched a definition of marriage where none had previously been prescribed: section 5(1). The Menzies Government, which introduced the Marriage Act, saw marriage as a fluid institution, the changing meaning of which the common law courts would be better able to monitor and interpret.<sup>4</sup> Second, the Marriage Amendment Act prohibited the recognition of same-sex marriages solemnised overseas: section 88EA.

It is evident from the decisions of the Full Court of the Family Court and High Court in the cases of *The Attorney-General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission*<sup>5</sup> (*Kevin and Jennifer*), and *Re: Wakim ex parte McNally*<sup>6</sup> (*Re: Wakim*) that the courts were indeed committed to the task of ascertaining and applying contemporary meanings of marriage in the

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<sup>1</sup> *Burns v Radio 2UE Pty Ltd & Ors* [2004] NSWADT 267 (Unreported, Rice DP, Alt and Bolt, 22 November 2004).

<sup>2</sup> *OV & OW v QZ & Anor (No 2)* [2008] NSWADT 115, (Unreported, Britton DP, Nemeth de Bikal and Schneeweiss, 1 April 2008).

<sup>3</sup> Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements* (2007).

<sup>4</sup> Commonwealth, *Parliamentary Debates*, Senate, 18 April 1961, 544-551.

<sup>5</sup> [2003] FamCA 94.

<sup>6</sup> (1999) 198 CLR 511.

cases arising before them. In *Kevin and Jennifer*, the Court recognised the right of a post-operative transsexual to recognition of her re-assigned sex and, consequently, her right to marry a person of the opposite sex. The Court in that case decided that the meaning of marriage in the *Australian Constitution* was not 'frozen in time' at the date on which the *Constitution* was enacted. In *Re: Wakim*, the Court considered the Commonwealth Parliament's constitutional power to recognise same-sex marriage.

The definition of marriage entrenched by the Marriage Amendment Act is that stated by Lord Penzance in *Hyde v Hyde and Woodmansee*<sup>7</sup> in 1856 to be '[t]he voluntary union for life of one man and one woman, to the exclusion of all others'. As the Honourable Alastair Nicholson QC, former Chief Justice of the Family Court of Australia, and leading Judge in *Kevin and Jennifer*, has observed:

... Lord Penzance's definition was inaccurate at the time that he gave it and remains inaccurate today. It is difficult to understand how even in 1866, marriage could have been defined as union for life, having regard to the passage of the *Divorce and Matrimonial Causes Act* in England in 1857. Given that about 40% of Australian marriages now end in divorce, it is a nonsense to refer to marriage as a union for life today.

Similarly, since the concept of matrimonial fault has been abolished by the *Family Law Act 1975* and in particular that adultery is no longer a ground for divorce, it is difficult to argue that a modern marriage necessarily excludes all others...<sup>8</sup>

It seems clear, then, that the Marriage Amendment Act was intended to remove the definition of marriage from the common law and substitute its own approach (albeit an approach consistent with an earlier view held at common law).<sup>9</sup> There was no consideration of whether the Act was necessary or proportionate to achieve its objects and therefore justify the breach of the human rights of lesbian, gay, bisexual, transgender and intersex people to equality before the law. Indeed, the objects of the Marriage Amendment Act were to make the arguably already discriminatory application of the Marriage Act expressly discriminatory.

### **Marriage, non-discrimination and equality before the law are human rights**

The human right to marry and found a family, as articulated in Article 23 of the *International Covenant on Civil and Political Rights*<sup>10</sup> (ICCPR) and Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights*<sup>11</sup> (ICESCR) is referred to in section 43 of the *Family Law Act 1975* (Cth) (the Family Law Act). The rights to non-discrimination and equality before the law are set out in Articles 2(1) and 26 of the ICCPR. The right to equality before the law has been observed by the United Nations General Assembly to mean that discrimination in any law and any field of public regulation by public authorities is prohibited.<sup>12</sup> Article 23 of the ICCPR entitles the family, as the natural and fundamental group in society, to recognition and protection by the state. Failure to recognise a right to marry when a couple is recognised as a family in other areas of law is inconsistent with Article 26 of the ICCPR because it denies a particular kind of recognition to some couples on the discriminatory ground of their gender and sexuality.

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<sup>7</sup> [LR] 1 P&D 130.

<sup>8</sup> Nicholson AO RFD QC, 'The Legal Regulation of Marriage' (Speech delivered to the Law Student's Society, Faculty of Law, University of Melbourne, Melbourne, 16 September 2004).

<sup>9</sup> *Re: Wakim ex parte McNally* (1999) 198 CLR 511, 553 (McHugh J), observing in relation to the Commonwealth's constitutional powers to legislate in relation to marriage, stated in relation to the *Hyde* definition that '... marriage now means, or in the near future may mean, a voluntary union for life between two people for life'. The Full Court of the Family Court found in *Kevin & Jennifer* that '[t]he concept of marriage ... cannot, in our view, be correctly said to be one that is or ever was frozen in time'. Cf *Bellinger v Bellinger* [2001] 2FLR 1048 [128] (Thorpe LJ), cited with approval in *Kevin and Jennifer*.

<sup>10</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

<sup>11</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

<sup>12</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination*, [12] UN Doc HR1/GEN/1/Rev 6 (General Comments) (1989).

The Bill provides the Parliament with an opportunity for Australia to join with the community of nations that have recognised same-sex marriages<sup>13</sup> and further rehabilitate Australia's international reputation as a leader in the recognition and protection of human rights and as a nation committed to equality, non-discrimination and equality before the law. While the Government is to be congratulated for expressing its support for and ratifying a number of international laws and instruments in the course of its first term<sup>14</sup>, none of these results in immediate change to the domestic laws of the nation. That effect has been reserved for its work on, among other things, workplace relations and same-sex relationships.

Not everyone wants to get married. For those who do not seek marriage, the de facto relationship laws of the states and territories provide equivalent protection to the Family Law Act. For those who wish to marry, there is no option.

Equal rights to marriage must be extended to everyone regardless of sexuality, gender or gender identity, as proposed by this Bill.

Yours sincerely  
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<sup>13</sup> Netherlands, Belgium, Spain, Canada, South Africa, Norway and Sweden.

<sup>14</sup> Ratification of the *Convention on the Rights of Persons with Disabilities* on 17 July 2008, accession to the *Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women* on 24 November 2008, ratification of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* on 21 August 2009, negotiation of an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* and has, in January 2009, issued a standing invitation to UN human rights experts to investigate human rights in Australia.