COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Recognition of Foreign Marriages Bill 2014

(Public)

THURSDAY, 21 AUGUST 2014

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Thursday, 21 August 2014

Members in attendance: Senators Carol Brown, Jacinta Collins, Hanson-Young, Ian Macdonald.

Terms of Reference for the Inquiry:

To inquire into and report on:

Recognition of Foreign Marriages Bill 2014.

WITNESSES

CROOME, Mr Rodney, National Director, Australian Marriage Equality

HORNER, Mr Jed, Policy and Projects Officer, New South Wales Gay and Lesbian Rights Lobby

IRLAM, Mr Corey Brian, Co-convenor, Victorian Gay and Lesbian Rights Lobby

KOONIN, Dr Justin, Co-convenor, New South Wales Gay and Lesbian Rights Lobby

MULCAHY, Mr Sean, Associate Committee Member, Victorian Gay and Lesbian Rights Lobby

Evidence from Mr Horner and Dr Koonin was taken via teleconference—

Committee met at 09:06

CHAIR (Senator Ian Macdonald): I declare open this meeting of the Senate Legal and Constitutional Affairs Legislation Committee. The committee is inquiring into the Recognition of Foreign Marriages Bill 2014. The committee proceedings today will follow the program as circulated. These are public proceedings, being broadcast live via the web. The committee may agree to a request to have evidence heard in camera and may determine that certain evidence should be heard in camera.

Witnesses should be aware that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of the evidence given to a committee, and such action may be treated by the Senate as contempt. It is a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but under Senate resolutions witnesses have the right to request to be heard in private session. It is important that all witnesses give the committee notice that they intend to ask to give evidence in camera. If a witness objects to answering any question they must state the ground upon which the objection is taken, and the committee will determine whether or not it will insist on an answer.

I welcome the witnesses and thank them for their submissions. The normal practice of Senate committees is to ask for a brief opening statement from those who wish to make one and then proceed to questions. Who would like to start? Perhaps Mr Croome.

Mr Croome: Ten years ago last week, the federal parliament passed amendments to the Marriage Act which made it clear that marriage in Australia would be between a man and a woman and that overseas marriages between members of the same sex would not be recognised in Australian law. Those amendments were in part prompted by two same-sex couples from Melbourne who had a few months earlier been married in Canada under provincial marriage law that allowed same-sex couples to marry and returned to Australia and asked the Federal Court for their marriages to be recognised in Australia. Since then, we know that at least 1,300 Australian same-sex couples have married overseas. That was the figure recorded in the 2011 census. More than likely, there are many more than that. We know that at least 300 of those have been married in New Zealand. Of course, because of the 2004 amendments, the moment that those couples step back through Australian customs they are no longer legally married in the eyes of the Australian government. The absurdity of this situation was highlighted last month when Australian same-sex couples with British passports began to marry in British consulates in this country, and the moment they stepped outside that consulate they were no longer legally married and were considered legal strangers.

This situation affects many more people than simply the couples who marry overseas. It affects their families and it affects their friends. This was highlighted for me recently when I attended the marriage of two of my friends in Auckland. As we know, same-sex couples are allowed to marry in New Zealand. They had wished to marry at home in Hobart but were not able to. So, for the sake of their two children and for the sake of providing those children with the stability, security and affirmation that comes with marriage, they decided that they would marry in New Zealand. I attended the wedding along with 40 of their other friends and colleagues, most of whom were heterosexual, and most of whom work at Cadbury's in Claremont in Hobart. We picked ourselves up, flew to Auckland to see the two men say 'I do' and then flew home. Amongst the attendees at the wedding, the witnesses to those solemn vows, there was a sense of disbelief that we would all go to so much trouble and the couple would spend so much money and go to so much effort for a marriage that was not recognised in their home country. But, of course, we still all did it.

For Australian Marriage Equality, this issue is fundamentally about respect. It is about respecting the solemn vows of a lifelong commitment that couples make under the laws of foreign countries. I believe that anyone who says that they respect the institution of marriage, who respects the benefits that attach to marriage and the responsibilities and the sacrifices, should support the law respecting these marriages by recognising them fully as marriages in Australian law.

As well as important values like respect, this issue is also about practical benefits. If couples who are married overseas were to be recognised in Australian law as married couples, then they would not need to jump through the legal hoops that are attached to the recognition of de facto couples, they would not need to prove their relationship status if they were challenged—as is often the case for same-sex couples, unfortunately—and they would also have all the benefits, recognition, rights and responsibilities that adhere to marriage in Australian law.

In our submission, we also point out some of the inconsistencies that arise because of the failure of Australian law to recognise overseas same-sex marriages—not the least of which, it occurs to me as someone who lives in Tasmania, is that overseas same-sex marriages are recognised already in state law, including the law of my home state, as effectively civil partnerships. In Tasmanian law, they are called deeds of relationship. So a same-sex couple married overseas, like the couple I mentioned earlier, when they return to Tasmania are recognised automatically as being in deeds of relationship. They have all of the same rights as spousal entitlements as married couples in state law. And because of their recognition as registered partners in Tasmania, in effect they have many of the same rights and responsibilities as married couples in federal law because they are recognised automatically as de facto partners—because they are in a state deed of relationship, because they are in a New Zealand marriage. It just seems to me an absurd that that couple, in order to receive some kind of spousal recognition in federal law, have to go through that legal circuit of marrying in New Zealand, being recognised in Tasmanian law and then in effect being recognised in federal law. Wouldn't it make it much simpler and less prone to problems for them simply to be recognised as married, in the Marriage Act, by virtue of their New Zealand marriage?

In our submissions we also talk about the impact of marriage equality overseas, the positive impacts that marriage equality has had in terms of same-sex partners, the children of same-sex partners and the institution of marriage and the positive economic impacts of marriage equality. I will not go into them because they are all quite well spelt out in our submission.

One thing we also deal with that I would like to briefly mentioned is the view of some—and I read this in some of the other submissions that have been made to the inquiry—about the so-called unintended consequences of allowing same-sex couples to marry or recognising overseas same-sex marriages. We deal at length about these so-called unintended consequences, which are mainly negative consequences and are mainly talked about by groups such as the Australian Christian Lobby, but I will just focus on two. One is religious freedom. In its submission the Australian Christian Lobby talks about examples of religious freedom being violated through the recognition of same-sex marriages. It cites six examples in its submission, four of which took place in jurisdictions without marriage equality.

Another one of the unintended consequences is the so-called slippery slope to the recognition of other relationships like polygamous relationships. In the world at the moment marriage equality prevails in almost 20 jurisdictions, the combined population of which is hundreds and hundreds of millions of people, and yet the Australian Christian Lobby can only find one example where there was legal recognition of a polygamous relationship in a country that does not otherwise have that cultural tradition. That was where one man has entered into a relationship with two women in the Netherlands under a so-called cohabitation agreement. A cohabitation agreement of the kind that has been entered into in the Netherlands does not exist in Australia; it is a peculiarly Dutch institution. And what we are talking about is a heterosexual relationship, not a same-sex relationship. We could just as easily say that heterosexual marriage led to the recognition of this polygamous relationship.

Having looked through all of these unintended consequences, it is my view that not only are they not unintended but they are not even consequences of marriage equality. I urge you to look very carefully at these arguments made by the Australian Christian Lobby and others about so-called unintended consequences and to consider as well the views of the Australian people—and this is the final point I will make. Last month the Sydney based research company Crosby/Textor did an in-depth survey of a thousand Australians on their attitudes to same-sex marriage. It found not only that 72 per cent of Australians support marriage equality—or, in the words of the question, allowing same-sex couples to marry—but also that these so-called unintended consequences do not resonate with the Australian people. It found that only 22 per cent of Australians believed that same-sex marriage would devalue traditional marriages; that only 17 per cent of Australians believed that there is a slippery slope that would lead to issues like polygamy; and that only 16 per cent of Australians believed that allowing same-sex marriage will lead to some people losing their religious freedoms. The Australian Christian lobby may fear these unintended consequences, but clearly the Australian people do not. Thank you.

CHAIR: Mr Mulcahy or Mr Irlam, do either of you wish to make an opening statement? No? Or our friends on the phone from New South Wales?

Dr Koonin: Happy to move to questions.

Senator JACINTA COLLINS: I have possibly only one question: what would you submit has changed since the Senate last dealt with this matter?

Mr Croome: What has changed is that an increasing number of Australian couples are marrying overseas, particularly in jurisdictions that are very similar to Australia's and where a large number of Australians reside, and that includes New Zealand and Britain. So, the problem that already existed has magnified, because New Zealand is close, and many couples are able to travel there to marry, much more easily than they can travel to the United States or Canada or Western Europe. And Australians with British passports can marry in consulates, so they can actually marry here—it is much easier for them. So, the problem has been magnified. What has not changed, of course, is the indignity of not having your solemn vows of lifelong commitment recognised when you return home.

Senator JACINTA COLLINS: Do those jurisdictions you referred to provide different domestic as opposed to international legislative arrangements?

Mr Croome: I am not sure what you mean.

Senator JACINTA COLLINS: New Zealand, for instance, recognises same-sex marriage as well as presumably recognising same-sex marriages that have occurred overseas.

Mr Croome: Yes.

Senator JACINTA COLLINS: Whereas what is being proposed here is that we progress with recognition of international same-sex marriages, which would be different to our domestic arrangements.

Mr Croome: Yes. There are two points, I guess. It is not unprecedented. There are other countries that recognise in various ways overseas same-sex marriages without allowing them to be solemnised under their own law. In Israel, courts can allow overseas same-sex marriages to be recognised in domestic law upon application.

Senator JACINTA COLLINS: In a different way to a civil union?

Mr Croome: Yes, I understand that to be the case. And, as we have said in our submission, under Australian law some foreign marriages that would not be solemnised in Australia are recognised for various purposes, including polygamous marriages.

Senator HANSON-YOUNG: I guess my question goes on from Senator Collins's question: what do you say to people who say, 'If we want this, why don't we just have full marriage equality and then deal with everything at once'?

Mr Croome: Yes! Why don't we? Of course. This would be dealt with by amendments to the Marriage Act that would allow same-sex couples to marry in Australia. But to those who say, 'Why don't we wait until then?' or 'What's the point of dealing with this separately?' I guess I have two responses. Firstly, we can deal with this separately; there are no constitutional barriers to dealing with this issue. One of the reasons, certainly in my experience, that same-sex couples marry overseas is that they have a sense of urgency. The partners might be ageing and wish to marry before they die, or they may have children to whom they wish to provide the benefits of marriage before those children grow up, which was the case with the couple I mentioned earlier who married in Auckland. They would much prefer to marry under Australian law, but they cannot wait. And I think we should respect the fact that they cannot wait and that it is urgent for them to marry. We should not be saying to them, 'You need to wait until the Australian parliament works its way towards this larger reform.' Why wouldn't we say to them: 'You have gone to the trouble and you obviously have important reasons for marrying overseas. We will respect that. You are in a legal marriage. We will respect that'?

I do get a bit emotional on this point, because I know same-sex partners for whom there was nothing more important than tying the knot. I know them at home in Tasmania, where they desperately wanted to marry under state laws that did not pass. And then federal reform failed again, and they have since died, and they will never have that chance. There is nothing that can bring that back. So, if couples feel that need and they marry overseas, I think we should respect that and give them the respect that their vows deserve.

Dr Koonin: Perhaps I could add a brief comment to what Mr Croome has already said. This bill has merits in its own rights for the reasons Mr Croome describes. Our position on full marriage equality is well known, and if and when a bill came before parliament again I think it would be clear that we would support it. Nevertheless, that is not a reason to provide support to those couples who have married overseas. We were asked to comment on whether we support this bill, and yes we do support this bill. And if another bill comes before parliament we will very likely support it again.

CHAIR: We are aware from your submission, of course, that you do support this. But thanks for that. Mr Irlam?

Mr Irlam: Perhaps I could just go to some practical reasons that we should do this bill now. Looking at submission 33 from the National LGBTI Health Alliance, I just want to read a paragraph from Appendix B:

Our foreign marriage was not recognised for my Australian partner visa application and thus we were held to a more rigorous standard than man-woman couples, having to provide extensive proof of a de facto relationship. For example, this included providing extensive documentation that we had lived together for 2 years, whereas man-woman married couples were exempt from this requirement. This discriminatory experience was distressing for me and my husband, and made us question our decision to move to Australia.

And they go on to talk about being highly skilled and recognised in their field—we had a bit of a brain drain from that.

Outside of the great state of Tasmania, where overseas marriages are recognised through the state relationships scheme, we have a situation—for the whole mainland—whereby somebody who enters into an overseas same-sex marriage does not have an avenue to be recognised automatically in Australian law, either at a state level or at a federal level. That is a bit of a history lesson that you all probably went through when we did the 2008 law reforms. We created the definition of 'de fact partner'. You can enter into a de facto partnership either by a registered relationship or through a de facto relationship. The only recognised registered relationships are state based schemes, and the only option for a couple living in Tasmania is to be in an overseas marriage or any other form of relationship register—recognised through Tasmania, and it goes up to federal law.

So, given that the government is, rightly so, very heavy on red tape and wants to reduce red tape, why are we making these couples who have already proven their relationship to have to dig up the last two years of their life to be able to prove that de facto status? Why aren't we just recognising these as marriages so that they can have that access to immigration, so they can have that automatic recognition under state and territory laws because they do not have to (a) live under one roof, (b) be together for a period of time, (c) collect a whole bunch of documentation, (d) prove that they were renting from a certain date so that they can establish the start point of their relationship? The whole reason Australia has gone through the de facto and then registered relationships and marriages to regulate is so that it is an easier process for them, and we are just making it harder for same-sex couples.

CHAIR: Could you just repeat what you said about the visa issue?

Mr Irlam: Sure. So under a visa entry—

CHAIR: Into Australia?

Mr Irlam: So one couple might be from the UK and the other couple might be from Australia.

CHAIR: From where?

Mr Irlam: From Australia, so one couple is migrating under a spousal visa entering Australia.

Senator CAROL BROWN: You mean one of the couple?

Mr Irlam: One partner of the couple, sorry. Thank you. The spousal visa requirements if you are in a registered relationship or a marriage are waived of any time limit. If you are in a de facto relationship or the law only recognises you as a de facto relationship, which is how the law would treat these same-sex couples who are married overseas, they have to be together for two years and have to be able to prove the existence of the relationship. It is a much higher burden that they are placed with than a married couple.

Senator HANSON-YOUNG: What do you think the response from the Australian community broadly is on this? We know that polls are suggesting that more and more people are becoming supporters of overall marriage equality. If you read a number of the submissions to this inquiry you would be led to believe that somehow Australians have a fear of the slippery slope.

Mr Croome: As I said, the research results do not bear that out. There is simply no fear there of the so-called unintended consequences. The research I mentioned before from Crosby/Textor has a statistical marginal error of plus or minus two per cent. They asked their 1,000 respondents: do you believe the institution of marriage would be under threat if same-sex couples were allowed to marry? And a tiny minority said yes. They asked: do you believe that children need both a mother and a father and legalising same-sex marriage would break that down? Again, a tiny minority agreed. They asked: do you believe same-sex marriages will devalue traditional marriages? A tiny minority agreed. As I said earlier, they asked: do you believe that religious freedoms would be at stake or it is a slippery slope? And a tiny minority agreed. The Australian people do not believe that performing same-sex marriages in Australia or recognising them from overseas would have any of the unintended consequences that groups like the Australian Christian Lobby talk about.

I understand there are people of faith who fear what this reform might mean because it is something that has not come to Australia yet. I guess we would all repeat our assurance that we have given again and again that we believe that ministers of religion should not be compelled to marry same-sex couples under any circumstances. Faith communities should not be forced to recognise—

CHAIR: I am glad you raised that because I was going to ask that before, although it is not particularly germane to our inquiry. Isn't that then discriminatory?

Mr Irlam: I do not think it is. I think that the faith based community has always been separated in the Marriage Act to say that, if you are entering into a civil ceremony, you have to do this set of words and do this legal hoop and, if you are in a religious ceremony, you have to follow your doctrines.

CHAIR: If a same-sex couple go to a church and say, 'I want you to marry me,' and the church says: 'No, I do not want to do that. It is contrary to our beliefs.' They would not get into trouble with the discrimination commissioner under the antidiscrimination laws?

Mr Irlam: Again there is equal treatment provided in the Marriage Act to enter into a marriage either through a civil ceremony or through a religious ceremony based on the doctrines of that religion.

CHAIR: But that is not answering my question.

Mr Irlam: Likewise, there are exemptions in the antidiscrimination law based on the doctrines of that religion. So what I would say to you is to allow religions that do allow it under their doctrine—and there are some out there; Quakers et cetera—but not require anybody to have to do something that is against that doctrine. The Marriage Act has always had a very strong—

CHAIR: You are saying to me that if a same-sex couple went to a church and said, 'I want you to marry me,' and the church said no, they would not be in default of some law or provision in Australia?

Mr Irlam: That is correct.

Dr Koonin: I refer you to section 37 of the Sex Discrimination Act. Section 37(d) grants that nothing in the act affects:

any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

So I think the exemption for religious practices is quite clear under federal anti-discrimination law.

Senator CAROL BROWN: I would suggest that it already happens with heterosexual marriages as well.

Mr Croome: Exactly. There is currently a provision in the Marriage Act that means that religious ministers do not have to solemnise any marriages they do not want to solemnise. A Catholic priest, as a celebrant, would not have to marry two people who were divorced or remarrying.

CHAIR: So hypothetically, if it were legal, if all the churches collectively decided they were not going to do it, the only option then is a civil marriage?

Senator HANSON-YOUNG: Which the majority of marriages in Australia are, right?

Mr Croome: Yes. The only option would be a civil marriage. Under the legislation as it currently exists, plus the extra safeguards for faith communities that have been proposed in all of the bills that have been put forward, there would be no possibility that a church or a faith community would be forced to solemnise—no, not at all. That provision, because it was the will of parliament and it was in the Marriage Act, would override any anti-discrimination provisions.

Mr Irlam: Can I just emphasise that I would strongly deter the Senate from legislating to prevent some of those religions who do want to marry same-sex couples from being able to do so, just because the majority of them do not.

CHAIR: That was not the question. It was a hypothetical, which as a good chairman I should not have allowed, but it was my own, so I did.

Senator JACINTA COLLINS: I will remember that principle!

Senator HANSON-YOUNG: That was actually the question I was going to go to next, Chair, so I am okay with that. What I want to get to—Mr Croome, you did mention this—is that it is not just a situation of people travelling overseas. We also now have a circumstance where people are marrying in consulates. This is all fairly new and relatively recent. Do we have any statistics about the number of couples who are expressing interest in marrying in consulates, or who have? What information is available to couples so they know that, even if they do that, it does not necessarily at the moment give legal status to that relationship?

Mr Croome: We know that about 300 Australian same-sex couples have gone to the trouble of marrying in New Zealand. That was in the first year or so, so we would expect that at least that number of same-sex couples would marry in British consulates because it is much more convenient and we know that many Australians have British passports or a British origin. We are talking about many hundreds of couples in the first year. I know of many already.

It is a very good point that you raise about letting people know exactly what this means. One issue that has come up for us is we have had contact from same-sex couples who have been married under British law or in other countries and have said: 'When we fill out an official Australian form, should we say that we are married or not? We believe we are married and we took those vows, but is that a false declaration? Are we breaking the law?' I do not know if there is any information out there for those couples about that situation.

CHAIR: What? A British couple?

Mr Croome: An Australian couple married under British law filling out an Australian form.

CHAIR: How can they be an Australian couple if they are married under British law?

Mr Croome: They have got British passports, but they are Australian citizens or Australian residents.

Unidentified speaker: Dual citizenship.

CHAIR: British citizens and Australian citizens.

Mr Croome: Yes. If they fill out an Australian form saying they are married, is that a false declaration? All of these problems come up and there is no information there except what we may be able to provide. There is no information from the Australian government about what it means.

Another difficult situation that has arisen since the advent of British consular marriages is that there are a number of couples that we are aware of who have British passports who have applied to marry in British consulates—this was in Sydney and in Brisbane—only to discover they could not because they were in state registered relationships. Australian state registered relationships are recognised under the British Civil Partnership Act as British civil partnerships and you cannot be in a British marriage if you are in a British civil partnership. So they are faced with a choice of either staying in their Australian state civil partnership or registered relationship and having, through that, a set of entitlements that accrue under Australian law or dissolving that so they can enter into a British marriage, which is only recognised as a state registered relationship in one state, Tasmania, and not in any of the others. No-one should have to face the choice of having substantive rights through having an Australian certificate or having the dignity and respect of a marriage but none of the rights. Those couples are being forced to make that choice right now. An easy solution to that would be to recognise overseas same-sex marriages.

Mr Irlam: It is not just about the symbolism of the British side of it; it is also about a couple who perhaps live in the UK for one year and then move to Australia. Do they have access under that UK scheme because they are under a UK marriage or do they have to flip-flop every time they move countries, because they are travelling? These are practical examples of the problems caused by this bill.

I think the secretariat beat me to the bullet to point out the Attorney-General's Department submission on the issue of the wording in the bill in relation to the consulate scenario. I would urge the committee to think about an amendment to the bill to address that issue and a number of others they raise.

Senator CAROL BROWN: First of all, do you have a copy of the survey that you have been quoting from?

Mr Croome: Yes.

Senator CAROL BROWN: Can we have that table for the committee?

Mr Croome: Yes.

CHAIR: Who was it done for? Who commissioned it?

Mr Croome: Australian Marriage Equality commissioned it from Crosby Textor. I can provide—

CHAIR: That is you?

Mr Croome: Yes, that is us.

CHAIR: It is up to you whether you make it available.

Mr Croome: I am happy to make it available so that you can see all the stats.

CHAIR: Thanks for that.

Senator CAROL BROWN: What improvements would you recommend to the bill to cover off some of the concerns that you have already raised?

Mr Irlam: Sure, there are four quick things—actually, five now because you have consulate definitions. There is also the issue with the wording around 'solemnised in a foreign country'. Some states and territories of that country may be the governing body for marriage—for example, the United States. So you might want to use language like 'solemnised under foreign law' or 'solemnised outside of Australia'. That would address both the consulate issue and the state based marriage laws in other countries. There is a little bit of a question challenge, if you like, around the High Court case last year recognising that somebody might not be a man or a woman in law, and using the terms, 'man and man' and 'woman and woman' in the definition may not be inclusive of intersex and trans people. I am not a legal expert, but I urge you to seek advice around the best set of words or to make a clarification that it is meant to be inclusive. It could be as simple as saying 'any two people'.

CHAIR: We have a witness who will probably address that issue. Thank you.

Mr Irlam: In 88B(4) there is a reference to section 5(1) of the act, which refers to the definition of man and woman, so you might want to look at repealing 88B(4), otherwise, even though you remove 88EA, it still refers back to a definition of man and woman governing the recognition of foreign marriage, therefore making the bill null and void. That is it in bullet points.

Senator CAROL BROWN: Thank you. Just the way I like it.

Dr Koonin: I would like to make a small comment on 88B. It seems that it would be necessary to repeal 88B(4) an order for the bill not to be null and void. You might want to check if that is in fact the position. I am not a lawyer, but is that enough to render this bill operational? Arguably, subsection 5(1) could still apply.

Senator CAROL BROWN: Thank you. I would now like to go to the slippery slope argument that you briefly mentioned, Mr Croome, in your opening statement. There is mention, obviously, through some of the submissions that we will be talking about today. You already said to the committee that there are countries that do not allow same-sex marriage under their domestic law but nevertheless recognise foreign same-sex marriages. Are you aware of any evidence that this recognition has impacted on the validity of marriage? In a country that does not allow same-sex marriage but recognises foreign same-sex marriage, what impact has there been on society?

Mr Croome: I gave the example of Israel. I am not aware of any change to the definition of marriage in Israel or the estimation in which that institution is held. I am sure if you were to invite representatives of that country—where I think marriages are solemnised to a high degree still in a religious context—I think they would say that marriage continues to go on as it always has.

Mr Irlam: Could I just also point out that every single lesbian, gay, bisexual, transgender and intersex reform for the last 30 years we have been having this discussion on things always has an attack of slippery slope attached to it, and not one of those predictions have ever come true in those 30 years.

Senator CAROL BROWN: I have one last question, as many of the things that I wanted to ask have been answered. A number of the submissions that oppose this legislation claim that the recognition of same-sex marriage is harmful and will have harmful impact on families and children. Your supplementary submission highlights some of the evidence that refutes this argument, but I particularly want to go to the fact that a number of submissions cite research by Professor Patrick Parkinson entitled *For Kid's Sake*. Can you expand on your response to this interpretation of Professor Parkinson's research?

Mr Croome: Professor Parkinson's research was issued a couple of years ago, I think. Professor Parkinson did not do any actual hands-on research himself; he reviewed the research that was available. If we look at the studies that he looked at, what we find is that children have disadvantageous parenting outcomes if there is discontinuity or instability in their upbringing, which can be occasioned by any number of different things—divorce of parents or whatever it might be. A small number of studies that he cited included some children raised at some point by same-sex couples. You will see that in some cases those children experienced disruption in their upbringing because their parents may have been in a heterosexual relationship and then they broke up and their parent entered a same-sex relationship. But it was not the fact that it was a same-sex relationship that was the issue here; it was the discontinuity and disruption in their upbringing.

I believe that what his study shows is that instability is an issue for children—not same-sex parenting. Same-sex parents can provide just as much stability and continuity in upbringing as anyone else and, if that stability and continuity is there, the outcomes are the same. All of the other studies into this issue which we deal with to some extent in our submission show the same thing—that the parenting outcomes of children raised by same-sex couples are the same—if not on some measures, better—than children raised by opposite-sex couples. Like I said, the issue that Patrick Parkinson was actually looking at was instability in upbringing not family formation.

Mr Irlam: Can I also just refer the committee to submission No. 30 from the Australian Psychological Society and their opening conclusion paragraph that refers to Professor Parkinson's study and says:

> Furthermore, there is evidence to indicate the value of marriage in providing stability to children (Parkinson, 2011). If we accept such evidence of the benefits of marriage in supporting mental health and family stability, depriving some families of those benefits clearly amounts to discrimination.

If it is good enough that the heterosexual norm should be that a marriage relationship is the best environment to raise a child then it is good enough to ensure that these children who you are not talking about today, who you have no jurisdictional governance over because it is a state law, who are created, who are legally recognised and who exist in same-sex families, should be provided with the exact same best fit model that others are arguing for.

CHAIR: We are talking about marriage as it is currently defined.

Mr Irlam: Based on what principles that constitute the best environment?

CHAIR: I do not know. I am not making the argument, but the—

Mr Horner: There is the recent report by the Australian Institute of Family Studies which provides a comprehensive overview of research in this area. I am happy to provide that to the committee. Again, I would stress the points that Mr Croome and Mr Irlam have already made about children in same-sex couples achieving the same outcomes if not more favourable ones. Again, it is from a reputable body. It is worth consulting in relation to some of the questions that Professor Parkinson raises.

CHAIR: We are running out of time. Can I just raise a couple of issues very quickly. What do you say to the argument that, if this bill is passed, you then create a discrimination between same-sex couples in Australia, who cannot get married—

Mr Irlam: Politics is incremental.

CHAIR: So you are saying: 'Fix it in Australia.' That is your answer?

Mr Irlam: We will get there.

CHAIR: Yes, but that is not quite the question. If this bill is passed, there is a discrimination set up.

Mr Irlam: Discrimination exists today where those couples are not recognised in anything other than de facto relationships. It is a step forwards in the process.

Unidentified speaker: I would also refer back to Dr Koonin's statement that this reform that we are talking about today, this bill, stands on its own merits. It does have its own merits in terms of recognising these existing marriages. We are not talking about creating new marriages; we are just recognising existing marriages. This creates a distinction, of course, but we need to be focusing on the merits of this particular bill.

CHAIR: Mr Croome, I think it was you who made the statement that one of your concerns is that solemn vows of lifelong commitment by those who are married overseas are not recognised. This is a personal view, but quite frankly I do not care whether anyone recognises my solemn vows of lifelong commitment to my wife. It is a matter between me and my wife, and what other people recognise or do not recognise is not of any interest to me at all. What would you say to that?

Mr Croome: Would you feel the same way if you went to New Zealand and when you got there you and your wife, after your long, happy marriage, were considered legal strangers? Would that affect you?

CHAIR: If there was some tangible way we were treated as strangers, but I cannot—

Mr Croome: If you did not have any marital rights in New Zealand, if people did not regard you as husband and wife?

CHAIR: As I say, this is a very personal view, but I could not care less what other people—

Mr Croome: If people questioned your right to visit her in hospital and make medical decisions if she fell ill?

Senator CAROL BROWN: I think the point is, though, that people treat marriage differently. For others it is something that they need to do and want to do with someone they love, and they want it recognised. That is the point of getting married.

Mr Irlam: It is. To get a feeling for what it is like, I will give you a challenge for a week. I want you to go to the party circuit with your wife and I want you to introduce her as your girlfriend to people you do not know and see what the reaction is and how you feel about the differences.

CHAIR: There would be genuine disbelief that someone as old as me could have a girlfriend! But, anyhow, I take your point.

Mr Irlam: Why would there be any difference to the genuine disbelief that a same-sex couple of your same age could only be boyfriends, could not be husbands? What is the difference?

CHAIR: I am not quite sure that I am following.

Mr Irlam: If you believe that there would be genuine disbelief that somebody your age could have a girlfriend, I would argue to you there is the same genuine disbelief that a married couple recognised overseas who have been together for 40 years, who happen to be in a same-sex relationship, could genuinely be referred to as just boyfriends.

CHAIR: I do not agree with that. The other comment you made was about the benefits, responsibilities and sacrifices that married people have that people in a civil union do not have. Can you just explain again to me, and I suspect it has been mentioned, just what benefits, responsibilities and sacrifices do married people have that those in a civil, legal union do not have?

Mr Croome: First, of course, I would have to say that the quality of one's relationship is not determined by whether one is married or not, and I did not mean to suggest that. Relationships can involve deep commitment and sacrifice and all the rest regardless of whether there is a marriage certificate. But there are certain associations and cultural expectations associated with marriage that you are making a commitment for life, which is not a commitment that you make if you enter a registered relationship or a civil union. Marriage provides us with a universal language of love and commitment that everyone understands, which is not the case with a civil union. Everyone understands what a husband is, what a wife is. Everyone understands what a—

CHAIR: But there are many heterosexual couples—I mean we go through periods, it seems to be changing a bit now again, but in the eighties, nineties, early 2000s, there were a lot of heterosexual couples—that never bothered to get married and did not really believe in it, but they had children, had a lifelong relationship and they were happy. Whether they were introduced as my girlfriend or my partner or what did not really matter to them. They knew what they were like with each other and that was it.

Mr Croome: Like I said, I am not suggesting that their relationship is lesser. I guess the final point I would make about them is that they had a choice.

CHAIR: Yes, okay, well that is—

Senator CAROL BROWN: The other part of that question, really, is the effect on same-sex couples that cannot get married. And, secondly, those that have been married in other countries are not recognised, and the effect on them. That, I think, is a much more important question.

CHAIR: Mr Mulcahy, you wanted to say something.

Mr Mulcahy: As to the practical benefits that recognition of overseas same-sex marriages would provide, I draw the committee back to the earlier comments by Mr Irlam about spousal visas. If overseas same-sex marriages are not recognised as marriages under federal law, a couple that undergoes an overseas same-sex marriage would then—if they were wishing to obtain the spousal visa—have to prove that they are in a de facto relationship under federal law. Now this would mean that they would have to go through, as Mr Irlam pointed out, all of the evidential burdens of proving that they are in a de facto relationship. If we recognise overseas same-sex marriages as marriages under Australian federal law, then they will be able to obtain a spousal visa without having to go through the evidential burden of proving that they are, in fact, in a relationship. So that is one clear area where recognition of overseas same-sex marriages provides a strong practical benefit for couples that have done so.

Mr Irlam: I also mentioned that there are a number of state laws.

CHAIR: I am not familiar with these laws. But if you have a civil union, don't you get the equivalent of a marriage certificate, which you would simply produce to the immigration officials?

Mr Mulcahy: If you have a civil union in Australia?

CHAIR: Yes.

Mr Mulcahy: Yes. The problem is that you cannot enter into a civil union in Australia if you are already married or vice versa. Somebody who is going overseas to the UK, for example, as Rodney pointed out earlier, because the UK scheme recognises the Australian based state schemes as a civil partnership under UK law. That is the first point. Second point: UK law of same-sex marriages will not allow you to enter into a same-sex marriage if you are under a recognised UK civil partnership. Yes? Therefore, if you have a reason—because your partner is from the UK, because you are travelling over there, because you are going to work there for three months, whatever it might be—to enter into that UK marriage, beyond just the symbolism of somebody wanting to recognise it as a marriage, you would not be able to because of that recognition in Australian law. On the flip

side, to remove yourself from the register in Australia will mean that you do not have any access to automatic entitlements under Australian law. So you are dammed if you do, dammed if you don't, depending on your situation and how that changes.

Mr Irlam: The issue here, Senator, is that basically, when we amended the 85 federal laws, on the legal statutes it is not much of a problem; it is all good because we are recognising everybody equally as de facto partners, defined as a registered relationship or a de facto relationship. When you then start getting into the regulations for those particular laws, there are a series of additional burdens that are attached to a de facto partnership that are not attached to a registered relationship.

CHAIR: Okay. Not that I disbelieve you, but I will just ask the secretary to put some questions on notice for the immigration department and perhaps send them the transcript of your evidence and see if they have a comment to make.

Mr Irlam: Yes, and I might do a supplementary submission to you with some things to help with that.

CHAIR: Okay. You are a lawyer, are you?

Mr Irlam: No, I was just intimately involved in the 85 law reform changes.

CHAIR: Okay. We really are over time, but does anyone have any burning final questions? Sydney people: did you want to say anything new that has not been said?

Dr Koonin: I think we have said enough. Thank you for your time, senators.

CHAIR: Thank you all for your—

Mr Irlam: Senator, can I just say one last thing to you all?

CHAIR: Yes, sure.

Mr Irlam: As you think about writing your report and making your recommendations, I want you to think of your elderly mother and whether she was at your wedding, and think of the elderly mothers of all the same-sex couples who want to make sure they are there for their weddings as well.

CHAIR: But can't they attend the civil union?

Mr Irlam: Is it a marriage? Is it a thing that an 86-year-old woman understands?

CHAIR: No.

Mr Irlam: Is it the social norm? If we look at all the sociology reports, they say people who are married live longer together, they create stronger bonds with their family and their community, it is socially understood internationally. Civil unions are proven not to be understood internationally. You do not access benefits.

Senator HANSON-YOUNG: Apart from the fact that we do not have [inaudible] civil unions.

Mr Croome: Which is why so many countries have moved on from civil unions and now allow marriage equality. There is only one state in Australia where you can actually enter a civil union through an official ceremony that a mother could attend, and that is Tasmania. None of the others do.

Mr Irlam: And, if you live in WA, the Northern Territory or South Australia, you do not have civil unions, so you do not have the option.

CHAIR: This is not a debate; it is an inquiry. But attitudes do change. My friends whom I was talking about before, who live together and have children, never got married. Coming from a small country town in North Queensland 30 years ago, I thought that was awful! Thirty years later, they are there and happier perhaps than even my wife and I.

Mr Irlam: Ten years ago, less than 40 per cent of Australians supported same-sex marriage. Now it is 72 per cent. Things do change.

CHAIR: Well—we are politicians; we understand polls and the questions you ask and the impact of them! Anyhow. Thank you very, very much. I found that useful. I am sure the rest of the committee has as well.

Mr Irlam: Thanks.

BOERS, Mr Paul, Private capacity

BROWN, Ms Anna, Director, Advocacy and Strategic Direction, Human Rights Law Centre

[10:03]

CHAIR: I welcome our next witnesses, from the Human Rights Law Centre. Thank you for joining us. Were you here when I did my long spiel at the beginning?

Ms Brown: Yes.

CHAIR: So I do not have to repeat that. You have made a submission. You are happy with it; you do not need to amend or add to that written submission?

Ms Brown: No.

CHAIR: Would you like to make an opening statement? And then we will ask some questions.

Ms Brown: Thank you. We definitely welcome the opportunity to give evidence before the committee today. The Human Rights Law Centre made a submission jointly with the National Association of Community Legal Centres, with support in particular from the Inner City Legal Centre. The National Association of Community Legal Centres is the peak national body of Australia's community legal centres. NACLC's members are the eight state and territory associations of CLCs. Community legal centres, as you would know, provide legal assistance to some of the most vulnerable and disadvantaged people in Australia's communities.

Appearing with me today is Paul Boers. Paul is a family law practitioner in private practice. He has been a longstanding volunteer at a number of community legal centres both in Sydney and in Melbourne. He has volunteered at the Inner City Legal Centre in Sydney and also the Fitzroy Legal Service, providing pro bono legal assistance to many same-sex couples and other LGBTIQ people on their family law issues, so I think he will be a valuable witness here today.

As the committee has heard already, the Marriage Act legalises and entrenches unacceptable discrimination against lesbian, gay, bisexual, transgender and intersex people. This bill will not achieve marriage equality in Australia; nonetheless, we strongly support this bill. This bill is a step towards marriage equality and gives the dignity of recognition to many same-sex couples that have entered into legally valid marriages. Most importantly, this bill would help resolve some of the unexpected legal consequences of the current law and bring us into line with our international obligations.

The discrimination that characterises Australia's current marriage laws offends international human rights standards and the obligation for Australia to uphold the principles of nondiscrimination and equality before the law. However, the issues raised by this particular bill go further. As a matter of international comity, Australia should recognise validly formed marriages from overseas, regardless of the sex or gender of the couple. We are a signatory to the Hague convention on the celebration and recognition of foreign marriages and it is our obligation under that convention to recognise those marriages. However, the problems go much deeper than offending international obligations. Australia's current laws on marriage leave same-sex couples in a maze of legal uncertainty when it comes to recognition of those relationships. You have heard already today about some of these problems; I am just going to go into a little bit of detail to give you the flavour of these problems.

Not recognising foreign marriages leaves many people in Australia in a situation whereby their marriage is legal in one country and not here. In some circumstances the law can actually leave individuals unable to divorce an overseas partner—in effect, they are in a legal black hole, unable to move on with their lives. This problem has arisen in cases involving community legal centre clients. Section 88EA means that same-sex couples who marry overseas cannot get divorced in Australia; they need to look overseas to get divorced, but can only do so if they establish the jurisdictional requirements for divorce in that particular country. If they cannot establish the jurisdictional requirements they remain unhappily married, caught in a legal black hole. If they seek to remarry in Australia they are not committing an offence of bigamy in Australia but they may be overseas, so you can start to see the sorts of problems that are caused here. Depending on where they remarry overseas it may be a void marriage, as under the Marriage Act a marriage while still married to someone is null and void. There are further practical and legal difficulties that have already been alluded to in evidence this morning—

CHAIR: Sorry, you are saying that if someone marries overseas and comes to Australia—

Ms Brown: It is a particular problem for couples that emigrate to Australia from overseas. In some situations couples have arrived in Australia—

CHAIR: If Australia does not recognise it, they do not need a divorce so they can marry someone else, but if they go back home they are bigamous—is that what you were saying?

Ms Brown: It depends on the country. Paul has had a particular case he could talk about.

Mr Boers: Yes, it is potentially so. If a same-sex couple marry in a overseas jurisdiction and cannot get divorced in Australia they have to look to the overseas jurisdiction where they married in the first place to see whether they can divorce there. I am assuming each individual country has its own jurisdictional requirements before you can apply for a divorce. In Australia, for instance, you have to either be an Australian citizen domiciled here or ordinarily resident for the past 12 months. I cannot say whether those jurisdictional requirements exist in overseas places where same-sex marriage is permitted but, assuming that it is, if you cannot fulfil those requirements that you cannot get a divorce in that place.

CHAIR: I am sorry I interrupted you, Ms Brown, and we will come back to your opening statement. What I was asking about was if you married overseas legally and came to Australia and it is not recognised, therefore you do not need to be divorced, therefore you can marry someone else—well, you could not marry a same-sex person.

Mr Boers: You could marry somebody of the opposite sex in Australia.

CHAIR: And if you went back home it would be bigamous.

Mr Boers: If you went back to the place where you originally had your same-sex marriage and you married somebody else, you could be committing an offence of bigamy, assuming that that offence exists in that overseas place.

CHAIR: This is highly hypothetical but if a same-sex couple marry in New Zealand, where it is a legal marriage, and come to Australia, where it is not recognised currently, they do not need to divorce to then marry an opposite sex person. Then, if they went back to New Zealand, they would be bigamists?

Mr Boers: Possibly.

CHAIR: It is an unlikely scenario.

Ms Brown: My understanding is there have also been cases where there have been calls on the estates of people. If you are still married under the law of the foreign country, all sorts of obligations flow from that. Just because you no longer want to be married to that person, that does not mean that legal status does not have some impact.

CHAIR: It depends where the assets are.

Ms Brown: Yes. So you can start to see the sorts of legal difficulties that are presented here.

CHAIR: It is a highly improbable scenario that I am raising.

Ms Brown: These are real cases of clients who have come to community legal centres who have found themselves unable to divorce and face real consequences.

CHAIR: We will come back to Mr Boers. Sorry, Ms Brown, for interrupting you. Please continue.

Ms Brown: As I was saying there is very real detriment suffered by same-sex couples and in other ways as well, as you have heard already, some of the practical issues. Again using the example referred to earlier, for couples who might be in registered relationships or civil unions recognised under state schemes, in order to marry in the UK they need to somehow undo that legal relationship in Australia and, if they come back to Australia, they would need to re-prove that their relationship is a de facto relationship because, despite having been originally in a registered relationship or other civil union that is recognised in Australia, effectively they have had to choose between the two jurisdictions. The way the law operates is quite absurd. The evidentiary requirements are quite onerous. As you heard earlier from the Gay and Lesbian Rights Lobby, we are talking bank statements, joint assets and all those other hurdles that are required. When you look at couples who are choosing between countries to share their lives together and to settle down, these are very real impediments, which have a real impact on these people, delaying them building their lives together, whether that is in Australia, in the UK or elsewhere. You can see some real reasons why they might not choose Australia as a place to settle down.

It is worth pointing out that, despite lack of recognition under the Marriage Act, our family law recognises overseas same-sex marriages for the purposes of property settlement and parenting issues. Our family law also recognises same-sex couples as parents. Lesbian couples can have children and they are both presumed to be parents. This is an important point because some of the submissions before the committee have sought to argue that recognition of foreign same-sex marriages would somehow change the structure of the family in Australia and this simply is not the case. This bill is not about family law; this bill is about our Marriage Act. Our family laws already recognise the growing diversity of families in Australia. There is no sound policy basis for refusing to recognise these marriages from overseas. In doing so, the parliament would resolve many legal and practical uncertainties and complexities that cause real, practical problems for these couples.

As you have heard already, other countries in the world have recognised this problem and, even though those countries have not taken the step of legislating for same-sex marriage domestically, they have already recognised these international marriages. We would, with respect, suggest some minor amendments that have already been canvassed in the evidence earlier this morning. The proposed new section 88EA makes express reference to unions between a man and another man and a woman and another woman. We think this language is unnecessarily narrow and may fail to capture the unions between transgender and intersex people. Our suggestion is to replace those words with 'two people' and keep it simple. The bill also retains section 88B(4), which provides that the meaning of marriage in section 88E is given by subsection (5)(1), that is, marriage is between a man and a woman. We suggest that that provision simply be repealed.

Our third minor amendment, which was not in our submission but was raised by some of the other submitters, which we also agree with, is to change reference to a marriage taking place in a foreign country to be under the law of a foreign country, to capture those circumstances where people are accessing marriage in consulates based in Australia. That concludes our opening statement. We would welcome any questions from the committee.

CHAIR: You do not want to particularly say anything at this stage, Mr Boers?

Mr Boers: I was going to add to what Anna had submitted. The emphasis in my submissions is on the absurdity of the different treatment that we have in cases where we have same-sex couples who cannot marry, yet under different provisions of the Family Law Act—essentially the same laws—property division is dealt with in exactly the same way as for opposite-sex married couples, and parenting issues are dealt with in exactly the same way as for opposite-sex married couples, with the exception of gay male couples. I could spend hours talking about why that is so. It has to do with how gay male couples have children: generally through surrogacy arrangements. We have had amendments to the Family Law Act which will recognise both women in a lesbian relationship as parents of a child, so they have the status of parent. Under the Family Law Act we have presumptions of parentage arising out of marriage, so same-sex male couples who have children through surrogacy arrangements will not have the status of legal parent. They will need to go through a legal process, which is evolving at the moment depending on which way case law in the Family Court is going at the moment, and which may or may not recognise them as parents. They would need to go through a further process at a state court level through step-parent adoption in order to obtain parentage. But, if there is a simple amendment recognising foreign same-sex marriages, those couples who have children would obtain the status of parent if they have children through artificial means. The reality of children to same-sex parents is that they are their parents, yet in the eyes of the law, in some circumstances, they are not legal parents. Under the Family Law Act you have the presumption of parentage arising out of marriage; if we do recognise foreign same-sex marriages, that will automatically formalise that parent-child relationship. That is one benefit that I can see in recognising overseas same-sex marriages.

Senator JACINTA COLLINS: So then, contrary to what Ms Brown said, there is a Family Law Act implication of this change?

Mr Boers: The change is under the Marriage Act, but what I am saying is that—

Ms Brown: It would make it easier in some circumstances.

Senator JACINTA COLLINS: To me that raises an enormous red flag, given all of the concern and public discussion around surrogacy issues that is occurring currently.

Mr Boers: Well, surrogacy is a fact of life. The press coverage of the baby Gammy case has not been particularly helpful, and what is happening in Thailand is an unfortunate case. If anything, I think that it has brought the issue of surrogacy into the public spotlight and, hopefully, there is going to be some constructive debate about it. Just last week, the Family Law Council released a report into our parentage laws, including surrogacy. There were various recommendations dealing with surrogacy arrangements that have been made which will go to the Commonwealth parliament. Whatever your view about commercial surrogacy or altruistic surrogacy—and the approaches of states and territories vary across Australia—if commercial arrangements are not legalised it is just going to be driven underground. That is another topic that we could spend hours talking about.

Senator JACINTA COLLINS: Yes. I am sorry, Chair; I did not intend to turn this into a surrogacy discussion. I think that is a discussion for another day. I just make the point that there seem to be inconsistencies in what is being put, and it does raise that as a flag that the committee might want to consider.

Ms Brown: Senator, it might help if we say that generally the family law courts take the approach of deeming couples in same-sex overseas marriages to be in a de facto relationship. So for all intents and purposes the family

law does treat them as in a de facto relationship, which means they have, for the purposes of parentage and property settlements, the same level of recognition as a de facto heterosexual couple.

Mr Boers: They can access the same laws and have their property and parenting cases dealt with in the same manner as in opposite-sex marriage cases.

Senator JACINTA COLLINS: With respect, Mr Boers, there was a press report today from some senior judiciary members—I cannot recall from where—highlighting the point that there are a lot of family law issues here in Australia as a result of what is happening with surrogacy that are problematic and that need to be addressed. I do not think this de facto issue is a straightforward answer to those issues.

Ms Brown: No. We are not suggesting that this bill in any way has an impact on those complex issues that require consideration by government.

Senator JACINTA COLLINS: Other than that it could have the automatic effect that Mr Boers has just highlighted.

Mr Boers: I just raised surrogacy as an issue. It is a means by which gay couples are having children.

Senator JACINTA COLLINS: I understood your submission earlier. I disagreed with it. Your submission was that surrogacy is a fact of life.

Mr Boers: It is. It has been around forever.

Senator JACINTA COLLINS: I am not going to have that debate with you here and now, but I am saying that I disagree with you. It is something that needs to be carefully regulated.

CHAIR: Ms Brown, what do you say to the argument that by recognising foreign marriages in this bill, if passed—and I accept the answer that it is an incremental step towards something else—it will mean that we are setting up discrimination against those Australians who are in a same-sex couple and are not married because at the present time they cannot be married?

Ms Brown: Obviously discrimination already exists. This bill remedies some of that discrimination. There is a difference in treatment, but there are differences in treatment at the moment.

CHAIR: It is another class of discrimination.

Ms Brown: But it also resolves a whole lot of legal and practical problems for these couples who are already in validly formed overseas same-sex marriages. So we think the benefits of this bill far outweigh arguments put to that effect.

Senator HANSON-YOUNG: I want to ask about this issue of religious freedoms. Can you go to that. There was some discussion with the previous witnesses about the legal protections of religious organisations that already exist. Can you, from the Human Rights Law Centre's perspective, address that.

Ms Brown: Our position is that the Marriage Act currently preserves religious freedom in the sense that it recognises the autonomy of religious organisations and their ability to undertake religious ceremonies and it does not require them to perform marriages that do not accord with their beliefs. Nothing in this bill will change that. Marriage is a civil institution and, as such, marriage performed by civil celebrants should not be affected by religious views, whatever they may be.

Senator HANSON-YOUNG: So you are suggesting the argument that some submitters have put to this inquiry that this will threaten those religious freedoms are unfounded?

Ms Brown: Yes. Our view is that those arguments are baseless.

CHAIR: Is it okay for churches to say, 'I'm not going to marry you because of—

Ms Brown: They can.

CHAIR: They do now, as Senator Brown pointed out. But, from the Human Rights Law Centre's point of view, is that okay?

Ms Brown: Yes. Freedom of religion is a human right. It is all about striking the right balance between the rights of churches and people of faith to uphold their religious views and the right to be free from discrimination and the right to equality. I think the Marriage Act in its current form—aside from the discrimination against same-sex couples!—effectively balances those rights.

Senator CAROL BROWN: I know you touched on this earlier, but I wanted to ask your view on improvements that can be made to the bill, particularly having concern for the rights of transgender, intersex and gender diverse people. Can you quickly go into that.

Ms Brown: Sure. I think I described it, and there is not much more to say except that as a society we need to be more aware of the particular circumstances of transgender people, gender diverse people and intersex people that do not neatly fall into the categories of male and female. Some of our laws have been set up in a way that have really negative impacts for these people. I think you will be hearing from an intersex advocate later today more about those issues.

When we say a man and another man and a woman and another woman what a man and what a woman is under Australian law is not clear, particularly after the Norrie case, and we have seen moves in other states and territories that do recognise the greater diversity in sex and gender that does exist outside those strict categories. By using the words 'two people' we can be sure that we are fully inclusive of anyone who is transgender, gender diverse or intersex and does not identify as purely male or female or may not fit within a legal definition of those concepts.

Mr Boers: The Family Court case in 2003 of Kevin and Jennifer dealt with the issue of gender. It was a declaration of the validity of marriage involving a female-to-male transgender and female who married. It is really case about the definition of gender—that there was more to gender than physical characteristics—and the court accepted expert evidence in relation to the concept of brain sex and your perception of your gender and how you live your life.

Senator CAROL BROWN: You may not be able to answer my next question, which follows on from Senator Macdonald's question about the inequality that this would create, because there is already inequality, as some would say. We have heard that some countries where same-sex marriage is not legal recognise foreign same-sex marriages. What issues have arisen there?

Ms Brown: I do not know the detail of those countries. I am happy to look into it and provide further information to the committee if that would assist. But my understanding is that Israel and Japan are examples in point.

Senator CAROL BROWN: If you do have further information, I would appreciate that. Thanks.

Ms Brown: I did want to suggest that we might make a very short supplementary submission on that surrogacy point as to whether there implications from this bill that flow to family law issues.

CHAIR: Only as it relates to this bill.

Ms Brown: Of course.

CHAIR: Thank you very much for appearing here today.

Proceedings suspended from 10:28 to 10:52

KELLEHER, Mrs Terri, National President, Australian Family Association

MUEHLENBERG, Mr Bill, Spokesman, National Marriage Coalition

STOKES, Mrs Jenny, Representative, National Marriage Coalition

CHAIR: I welcome representatives of the National Marriage Coalition and the Australian Family Association. Thank you very much for your submissions and for appearing today to give us your oral evidence. I want to put in an apology for the deputy chair, Senator Collins, who has had to leave. Her husband is not well. She has had to go and do those sorts of duties. So there is an apology from her. Did you want to amend or add to your written submission, or should we just go straight to an opening statement from you?

Mrs Stokes: We have an opening statement that summarises and adds a couple of points to that.

Mrs Kelleher: The same here. I have handed up the extra comments I am going to make.

CHAIR: Thank you. Who wants to start?

Mrs Kelleher: The bill is about same-sex marriage. The first point I would like to make very quickly is that the federal parliament decided overwhelmingly less than two years ago against any redefinition of 'marriage'. Now it has been raised again by the back door. This is not about recognising foreign marriages; it is about recognising foreign same-sex marriages.

I would like to make some general points. It will produce an internal inconsistency within the Marriage Act. Section 5 defines 'marriage' as the union of one man and one woman. The bill proposes that another type of union—that is, the union of two people of the same sex—be recognised and given the status of marriage.

The consequences of the introduction of such an inconsistency will be, firstly, a renewed demand to change the definition of marriage to remove the inconsistency; and, secondly, confusion and perhaps legal action over what will be recognised as a foreign same-sex marriage in some jurisdictions. In fact, there are relationships between people of the same sex that are not in-law marriages but they are treated as marriages. Will they be foreign same-sex marriages recognised in Australia? Canada, for example, by an oversight, does not provide for divorce of same-sex marriages. If people who are married in Canada come here, will the Family Law Act apply to their marriage if it breaks down? Thirdly, it will have produced a parallel system of marriage which is contrary to what the federal parliament sought to do in passing the Marriage Act in 1961, which was to ensure a uniform code of marriage throughout Australia.

This bill seeks to redefine in law the institution of marriage. Our statement is that marriage is the foundational unit of society and that, therefore, the onus is on those who wish to change the definition of marriage, which has been understood until comparatively very recently as the union of a man and a women—and still is in most countries of the world—to prove or demonstrate that there will be no harm in doing this. We say there is evidence that legislating same-sex marriage does harm to society and to individuals—and I refer the committee to the research by UK sociologist Dr Patricia Morgan, which is referred to in the AFA's written submission. She found that, 'As marriage is redefined to accommodate same-sex couples, this reinforces the irrelevance of marriage to parenthood' and separates marriage from parenthood and drives the message that 'any family form' is acceptable.

There is a large body of evidence, we say, that children actually do best on a huge number of measures if they are raised in an intact marriage by their biological parents—that may not always be possible, but that is the gold standard—and anything else should not be legislated. There is also plenty of evidence of the cost, personal and economic, of children not doing well if they are not reared by their biological parents or at least a mother and a father in an intact marriage.

I have handed to the committee a short typed list of further points to the bill that I would like to speak. Firstly, it is argued that same-sex marriages occur overseas; so why shouldn't they be recognised in Australia? Well, it is not just same-sex marriages; some countries allow polygamy and some allow child marriages. So why should Australia feel that they have to follow and recognise same-sex marriages? I do not think that there would an argument for child marriage or polygamy present in Australia. Secondly, the recognition of same-sex marriage is the first legislated step towards recognition of same-sex marriages performed in Australia.

CHAIR: I think you are at one with those in favour of the bill on that issue. They acknowledge that this is a step to a broader issue. So you do not need to argue that point.

Mrs Kelleher: You are right, Chair. I am not arguing the point but making the point that that is in fact what it is about. I am now talking about the consequences if you legalise same-sex marriage in Australia. It would lead to the prosecution of businesses and churches that refuse to participate or be involved in such marriages. Same-sex marriage has been used as a legal means to force businesses and churches to either perform the services of such

marriages or be prosecuted under anti-discrimination law. In the United States there are quite a number of cases. I will not go through them all, but I have listed in the document businesses who have been prosecuted and heavily fined for not wanting to be involved in a same-sex wedding—florists, cake bakers and photographers.

We do not have to go to America to see the demands for the denial of these freedoms not to be involved in same-sex weddings. The ACT Attorney-General, Simon Corbell, said in a letter to the Australian Christian Lobby last year that his ACT same-sex marriage law—which was struck down by the High Court—would be reinforced by the Discrimination Act, making it unlawful for those who provide goods, services and facilities in the wedding industry to discriminate against another person on the basis of their sexuality or their relationship status. This includes discrimination by refusing to provide or make available those goods, services or facilities. So it would happen here.

Furthermore, Australia's GLBT people at community and legal and human rights groups have openly called for denying businesses and churches the freedom not to participate in same-sex marriages. When there was the inquiry by former Attorney-General Nicola Roxon into consolidating all the Commonwealth antidiscrimination laws, 31 GLBT legal and human rights groups made submissions arguing that there must be no exemptions or, if exemptions are granted, they must be severely restrictive or that organisations seeking exemptions should be subject to onerous application provisions and conditions or a combination of those—I list those organisations in the handout.

The third point, and the most important point as far as the Australian Family Association is concerned, is the effect on children's rights. Our submission is that it is time to listen to the demands of donor conceived children who have been denied their birthright to know their biological identity and their biological family. We say it is time to stop amending federal and state laws to grant more groups access to donor conception in surrogacy and, instead, change the law to give back to children their right to know their identity—their biological parents, brothers, sisters, grandparents and medical history. This is the birthright of every child and is recognised in the UN Convention on the Rights of the Child and the UN Declaration of the Rights of the Child—and I refer in the handout to the specific articles of those instruments.

To state clearly what recognition of overseas same-sex marriage means, it means recognising that same-sex couples have a compound right to marry and have children, but, since by their nature they cannot have children naturally, they must have the right to have children by means other than natural reproduction, which means widening access to donor conception and surrogacy in a manner that offers no guarantee that the birthright of such children will be respected. Australia's GLBT groups are pushing to have the biological parents of their children removed from the child's birth certificate. That is in attachment 1 to the handout. If you look at Wikipedia's GLBT rights in Australia, it provides a checklist of their demands and it includes access to donor IVF and surrogacy, among other things that are listed—and, again, that is an appendix to the handout.

Marriage involves children and it is the duty of the state to protect these children by legally supporting their right to their biological identity and heritage. Today there is a strong resistance from donor conceived children to the fact that many have been denied their birthrights and many have become campaigners against donor conception, saying this is no way to bring children into the world. I think some of us may have seen *Australian Story* recently, the story of a young woman who had been conceived—

CHAIR: Mrs Kelleher, I do not want to curtail you, but we have this in writing. Also, I do not want to enter into the wider debate of surrogacy of children, which is a broader debate.

Mrs Kelleher: We say that actually the main point about same-sex marriage is that this will flow and children's rights will be denied. I have handed up the handout, so that is the end of what I have to say. Thank you for your patience.

CHAIR: We do want some time to ask you questions.

Mrs Kelleher: Yes, I know.

CHAIR: And I am keen to confine this hearing to the actual bill. The wider issue is a debate I fear will be around for some time, but at the moment we are just talking about the recognition of foreign marriages. But I understand you are saying these are consequences—

Mrs Kelleher: We are actually saying that that should be considered before we go ahead with this social experiment.

CHAIR: All right, thank you. Mrs Stokes or Mr Muehlenberg, would you like to make a statement?

Mrs Stokes: Yes. The National Marriage Coalition, which we represent, thanks the committee for the invitation to speak. Mr Gerard Calilhanna, the Coordinator of the National Marriage Coalition, apologises for not

being here. He lives in Sydney and was unable to come. He has asked Bill Muehlenberg and me to represent the coalition. Bill is the Director of CultureWatch and will speak about the impacts of the bill on society. I am the Research Director for Salt Shakers, a Christian ethics action group, and I will look at the legal consequences of doing this.

CHAIR: How did you get the name Salt Shakers?

Mrs Stokes: As a Christian group, it comes from Matthew 5, where Jesus said, 'You are the salt of the Earth.' It always, always gets a question! The National Marriage Coalition, which was formed in 2004, is a network of like-minded organisations that support the definition of marriage as it always has been and as contained in the Marriage Act 1961:

marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

As such, the National Marriage Coalition opposes any change to the Marriage Act and does not support same-sex marriage, as we are currently discussing. We believe the Recognition of Foreign Marriages Bill 2014 represents yet another attempt to undermine the marriage law that we have here in Australia. We would say that parliament has already considered a similar bill. In June 2013, the Senate voted on a bill to legally recognise foreign same-sex marriage, and that was defeated by 44 votes to 28. We contend that parliament should not be spending time debating a similar bill so soon after.

Regarding same-sex marriage itself, which we would say is a separate matter, that again is a matter for the parliament to decide, and we would say that this bill is really a backdoor way of getting same-sex marriage legalised. We recognise your point that even those who support the bill say that this is a two-step process. In our submission we point out that Senator Hanson-Young herself admitted in her second reading speech:

This Bill offers a modest and practical step forward to marriage equality …

We would say that, if marriage equality or same-sex marriage is to be debated, it should be debated as a separate issue, not in this step-by-step approach as a backdoor method, because we say that this recognition of foreign same-sex marriages would actually undermine the Marriage Act and create two types of law within the one act. In short, the bill would result in, as we put in our submission, two separate and contrary definitions of marriage existing side-by-side in Australian law. Whilst marriage would continue to be defined as 'the union of a man and woman to the exclusion of all others, voluntarily entered into for life' in section 5 of the act, there would be one exception—for homosexual couples that are married overseas. We would say this proposal to recognise some same-sex marriages would undermine the Marriage Act to make it internally inconsistent.

It would also create potential legal challenges to the Marriage Act. Homosexual couples who could not marry overseas might contend that they have been treated unequally, and there are these two classes of homosexual relationships: some who are married and therefore get the legal benefits of marriage, and some who are not. We would say that same-sex marriage itself, which we would oppose, should be debated on its merits separately, not in this bill. We also say that it would lead to increased calls at the court level, with people challenging that. We know that the 2004 definition of marriage in the Marriage Act was actually inserted because there were threats of legal action being taken by some homosexuals on the basis of getting their marriages recognised. We also say that it would increase calls for the federal parliament to legalise all homosexual marriages in Australia in order to remove the anomaly in the law that would be created by this bill. So there would be pressure on both court and parliament from this particular bill.

We also say that other groups could seek to have their foreign marriages recognised, and the Marriage Act is very clear in that it recognises foreign marriages that are legal in Australia. That is already the case, even though the name of the bill might not suggest that. So the Marriage Act currently recognises foreign marriages that are legal. If one exception is made for homosexual marriages that are performed overseas, what about other groups of people who are in marriages that are legal overseas but not in Australia? Would they or their advocates also be campaigning to have the Marriage Act extended to another group of people, as well as the homosexuals?

CHAIR: Sorry to interrupt you, but do you have examples of that?

Mrs Stokes: Yes, I do, and I have information to document those as well. So I can add that. In particular—Mrs Kelleher referred to some of those other groups—in some countries we have multiple-partner marriages, where a man can legally have more than one wife. A particular case relates to the situation in Canada. When same-sex marriage was legalised in Canada, the then Prime Minister, Paul Martin, in 2005 commissioned a study to debunk the argument that polygamy would be next—that, if you legalised same-sex marriage, then polygamy might follow because other groups would claim that right. He commissioned three law professors from Queen's University to carry out a study on the recognition of polygamy and particularly the recognition of foreign polygamous marriages, which is really what we are looking at here. There is a full study; I have taken an abstract

and some sections from it. The researchers actually recommended that the law in Canada be extended to include rights for polygamous relationships. One of the cases they quoted was that of a Kuwaiti man who wanted to emigrate to Canada and had been refused permission on the basis that he would be living in a polygamous relationship when he arrived with his two wives. The two legal professors said that the left-behind wife would be discriminated against if they did not accept this foreign polygamous relationship as a marriage in Canada. So they recommended an extension of the requirements to the recognition of polygamous relationships of people in Canada. But they also said that a civil challenge to the polygamy law in Canada would undoubtedly have merit because of some of the arguments that they put forward. This was not really what the Prime Minister wanted to find; he wanted to find that there was no merit in this argument. So, especially if we are looking at the recognition of foreign marriages, this study certainly is a precedent.

The only reason it did not happen in Canada, the only reason they did not go down this track, was that some of the Islamic women's groups complained about the treatment of women within their religion and asked for polygamy not to be recognised. Certainly, there was quite a legal case. Here is an article about that. The other case, as has already been mentioned, is to do with child marriage and child brides, and there has certainly been—

CHAIR: Just for identification purposes, what is the article?

Mrs Stokes: This is an article about the Canadian study. The first one has the details about the Canadian study.

CHAIR: From *The Washington Times* dated 21 January—

Mrs Stokes: 2006.

CHAIR: 2006. Okay.

Mrs Stokes: I have handed you one of each. The study with the actual details is that other one.

The other case is the marriage of under-age girls or child brides. There are many countries around the world, especially in Africa, that do not have a minimum age for marriage. I have an article here about Iran, where the legal marriage age for girls is 13, and they are talking about lowering that further. In some African countries, there are quite young marriage ages as well. The point is, if you have people from some of those countries where child marriage is legal, they may too say, 'We want our marriages, which are foreign legal marriages, accepted as legal marriages here in Australia.' If you make an exception for one group, you open the door for the same arguments. Where does it go from there?

In conclusion, the National Marriage Coalition believe that Australia should not recognise foreign same-sex marriages. The Marriage Act does not recognise such marriages as legal, and we say that we should not, therefore, legally recognise those marriages performed overseas. We say that it would create an anomaly in law and undermine the Marriage Act and we recommend that the Recognition of Foreign Marriages Bill 2014 not be supported.

CHAIR: Mr Muehlenberg, did you want to add to that at all by way of an opening statement?

Mr Muehlenberg: Yes, thank you. I have just two, hopefully, brief points to supplement or highlight what has already been expressed in the submission, both of which tend to tie in with what has already been said here. The first is very simple, and that is: everything changes when we change marriage. When we grant, effectively, special rights to a small group to change the nature of marriage, everything else is impacted. So, as in the discussion we have already had about family law and surrogacy, everything certainly is thrown up in the air in the mix. Even though the other side strongly deny there will be any problems with, say, religious freedom and freedom of conscience, we certainly know—and I think they actually know—that is not true at all. Everything changes and there are grave restrictions to all kinds of freedoms, whether it is freedom for small business or freedom of religious conviction.

I have been closely following this debate for a good 25 years. I have actually written three books on the topic, totalling about 1,500 footnotes, so there is a lot of documentation that is out there and available. This whole idea that, if legislation like this goes through, it will not have an impact on religious or cultural conscience? We know that is not true. We already have over a dozen countries now that have legalised homosexual marriage, and the results are in. In fact, part of my problem with my newest book was simply, 'When do I stop? I have to get this to the printer.' Every week there was another case of anti-Christian discrimination: people losing their jobs, being heavily fined and, in some cases, even put in jail if they did not go along with the homosexual agenda or if they insisted that marriage, in fact, should be between a man and a woman. To simply say that has resulted in many people losing their jobs.

I finally had to draw the line and in my newest book I have 165 examples, simply over a two-year period, of these very things: people being discriminated against, people losing their jobs, people having to violate their own conscience or their own religious beliefs simply for affirming the natural understanding of marriage. Despite the claims of the other side, everything does change. You guys will certainly be very busy with a whole raft of changes: surrogacy will just be one, family law—everybody will be impacted. So that needs to be stressed and certainly the documentation for that is there.

My second point is simply to remind us of the reality here. We are talking about a very small group pushing this agenda: two per cent, tops, of the population, as countless studies have now demonstrated. Of that two per cent, a recent study here for example found that only 20 per cent were actually keen on homosexual marriage; and, of that percentage, those who will actually go and do it, who will get married if it becomes legal, becomes even a smaller group yet. The point is: should government policy be really dictated to by this very, very small yet vocal minority group and really undo millennia of understanding of what marriage is? It has always been recognised in almost every human culture as the union of a man and a woman for life. So the idea that this small group is now going to change so radically and drastically one of the most important social institutions Australia and the world have known is quite a concern, actually.

On that point, let me simply point out that, as I have already mentioned, not everybody in the homosexual community is keen on this. Let me just read a very short email I just received two days ago, quite unsolicited—he would have no idea I am here. His name is Dave. He simply sent this to me out of the blue, but I think it is very telling and representative of many in the homosexual community. He says:

Bill Muehlenberg

I am gay. Please don't see gay pride parades, Conchita Wurst—

the Eurovision Song Contest winner, if you are familiar with that—

and other immoralities as representative of gay people. Gay pride parades are orchestrated by Leftists who want to sexualise our children and although I am gay—

he says, with emphasis—

I do not support gay marriage and there are many gay people who would agree with me. I believe it is in the best interests of the child for it to be raised by a mother and father.

Mr Muehlenberg, many gay people are good regular folk. It is the Leftists who are trying to convince us that somehow we are victims and we must attack the traditional family. Many gay people—

again, emphasis—

do not follow that argument. Those who support those gay pride parades are sick and they are not representative of us. The real threat to the West are the Leftists and the cultural Marxists pushing this ideology.

It is interesting that this came out of the blue but, as I document in my books, that would be true—many are not in favour of this radical shift. In fact, I think your very first witness here today, Rodney Croome—and, again, I document this in my books—not long ago said quite clearly: 'This is not an issue for the homosexual community. Homosexual marriage is a waste of time. We need to devote our energies to more important matters.' This was one of your earlier witnesses saying this.

CHAIR: When did he say that?

Mr Muehlenberg: It is all in my books. I can give you the exact date.

CHAIR: You're not here promoting sales of your book, are you?

Mr Muehlenberg: No. Hey, I'll give them away! Absolutely, it is there. Mind you, there are 1,500 documents, but I can certainly send it through, no problem.

CHAIR: We will put your comments about Mr Croome back to him.

Mr Muehlenberg: I will send you his actual words, that is easy.

CHAIR: How long ago was that?

Mr Muehlenberg: It would have been about 10 years ago maybe now. So, again, there are trends, there are shifting sands here. At the moment it is popular.

CHAIR: Mrs Kelleher, you mentioned—and Mr Muehlenberg you spoke around it—that the churches would be prosecuted if they did not conduct gay marriages. I am not sure if you were here earlier on, but I raised that issue. I was referred to section 37 of the Marriage Act, which says that is definitely not correct. Churches are not subject to any form of action if they refuse to—

Mrs Kelleher: That is why in the additional comments I pointed out all the GLBT legal and human rights groups that, in fact, want to do away with religious exemptions—and that would be one of them. That is our concern.

CHAIR: So you acknowledge that currently that does not happen. What you are saying is that there are some groups who are calling for that provision of the act to be removed.

Mrs Kelleher: Not that provision in the act. It was in relation to the antidiscrimination legislation across the board. But it is all part and parcel. It is in that basket.

CHAIR: I understand.

Mrs Kelleher: In Denmark they thought they were not going to have to perform same-sex marriage ceremonies either. But, in fact, they do. The freedom they have is that, if a priest of the Lutheran Church does not wish to solemnise the marriage, the local bishop has to find another priest who will.

CHAIR: But that is not the law in Australia.

Mrs Kelleher: No. I am just showing the way that it goes. In fact, there is a prosecution in the UK by two homosexual men who have children and run a big IVF business. They have six children, I think. They are suing the Church of England because they wished to marry and the Church of England would not marry them.

CHAIR: Okay, but in Australia it is not legislatively allowed at the moment.

Mrs Kelleher: I am not aware of that provision, but I accept what you say.

CHAIR: But you did also say that florists and taxi drivers have been prosecuted in the United States.

Mrs Kelleher: Yes.

CHAIR: Is there evidence of that in Australia? Does the provision of the Marriage Act relating to churches not being forced to do that also extend to other people?

Mrs Kelleher: I am not aware of the provision and whether it is specific. I understood from what you were saying that it specifically relates to the solemnisation of the ceremony.

CHAIR: In relation to the church, yes. Does anybody else know, by any chance?

Mrs Stokes: Certainly under discrimination laws there would be the potential. Most of the cases we have seen have been in America, the UK and Europe.

Mr Muehlenberg: My 165 documented cases are from overseas where homosexual marriage has been legalised. The point is that this is what tends to follow. Although we do have general cases here of, say, Christian groups being challenged in the courts by homosexuals for not renting out their property for a weekend function. Right here in Melbourne we have examples of that. So it is not specifically on the marriage issue, but it is already beginning to happen in Australia.

CHAIR: Can you give us a reference to that?

Senator CAROL BROWN: As far as prosecutions taking place, are they under the Marriage Act or another—

Mr Muehlenberg: It would more be under antidiscrimination laws.

Mrs Kelleher: It is under the Equal Opportunity Act of Victoria.

Mr Muehlenberg: The point is that there is a precedent for this kind of thing. It is already happening. Groups are being sued and taken to the courts by the homosexual activists because they refused or did not feel they could in good conscience provide a service that was being demanded. We will have more of that here against cake makers and florists once homosexual marriage is legalised.

Senator CAROL BROWN: Mrs Stokes, in your opening presentation you talked about the fact that we should not be debating this issue so soon after the vote in parliament. Do you want to see this debated again, or is it just about a matter of time? What do you mean by that?

Mrs Stokes: I think that is one of the points that the parliament had made a decision on that was actually quite clear-cut. It seems that if you introduce a bill a year later that is a very short period of time. Personally, I would not like to see it debated again, because we actually do not support the bill.

Senator CAROL BROWN: So no amount of time.

Mrs Stokes: To actually have it go to an inquiry and spend a lot of parliamentary resources and time debating a bill, when there seems to be a lot of important things to be debating that—

CHAIR: This inquiry is not alone in that area, in my humble personal view.

Mrs Stokes: That is right. You probably go over these things all the time.

Senator CAROL BROWN: I am not sure if you were here earlier, but are you aware of the survey that was quoted in the evidence given to us today about a survey that was undertaken by Crosby Textor?

Mrs Stokes: Yes, I am aware of the study. Mr Calilhanna has written a detailed response to the survey, particularly using some of the questions. One of the things about the survey is that the questions were not published. At least in some of the Galaxy reports they do publish the questions so that you can analyse what questions were asked. Having been a maths/statistics teacher at some time, I can say that it does depend on what questions were asked, in what order and in what context. There as an article by Patricia Karvelas in *The Australian*, where she actually did reveal some of the questions, and Mr Calilhanna has done a detailed analysis. I would be happy to send that to you, as well. Our point there is that they often ask questions—I do not have it in front of me—but the questions lead to a particular response. In fact, the question that got 78 per cent supporting same-sex marriage actually asked, 'Do you agree with the right for all people to be happy?' The question is really about happiness and sort of included the right of gays to marry. That is sort of added on to the end. It is interpreted as 'Do you support homosexual marriage?' but it is actually a question about if you think everybody should be happy. Yes, we do.

Senator CAROL BROWN: We will be receiving a copy of the survey. We will be able to see exactly what the questions were.

Mrs Stokes: I think the important thing is that it depends on who has commissioned the survey. In that particular case the survey was commissioned by Australian Marriage Equality, who want a particular answer, and they work with the survey company—

Senator CAROL BROWN: A very experienced survey company.

Mrs Stokes: Yes, who actually have made statements—we have those—that are supportive of the particular issue. You can work with them, but if you are paying and commissioning a survey—they have done the same thing in the Galaxy surveys—you can determine what the questions are going to be.

CHAIR: As I commented when it was raised—

Senator CAROL BROWN: You can determine the questions but not the responses.

Mrs Stokes: Certainly, but the previous survey, which was done by Galaxy but was commissioned by PFLAG, their question—and they did have the Galaxy questions online—said that in a number of countries overseas same-sex couples are able to marry, so do you think they should have the same right in Australia? So you are putting the thought in people's minds that other countries allow it so why don't we? It actually can be determined, and the person commissioning the survey can be influential in what sort of questions they want asked.

Senator CAROL BROWN: But if it is as you said in that last example, then if they put it like that—that same-sex couples can marry overseas and why can't they here in Australia—and they say, 'Yes, I agree,' surely that is a reasoned response by them?

Mrs Stokes: One could argue that, but we would say that you have actually put a context in at the start of the question. You have put an idea in the person's mind either by a previous question or at the start of that particular question. I am speaking from memory, but I know I looked at the Galaxy survey at the time. You are putting an idea into their mind to actually then lead to a question. In the Crosby Textor survey it was very much a leading question about happiness that then talked about gays marrying.

CHAIR: As I said, we mentioned before that we are politicians. Crosby Textor are very reputable and honourable, but as politicians we know that—although I am not sure that politicians take too much notice of polls, except the ones that say we are well ahead—

Senator CAROL BROWN: I hope not, Senator Macdonald, or our party organisations would be wasting a lot of money, if they tell us only what we want to hear.

Mrs Stokes: It brings to mind a survey by Dr Brian Pollard, who was a palliative care specialist at Concord Hospital. He, writing on the euthanasia question, said the same thing: it depends on what question is asked. He asked: do you support the right of people to die with dignity and to choose the time of their death? People may well say yes. He wrote an article on this. If you actually ask, 'Do you agree with people being injected with poison for somebody to kill them?' you might get quite a different response. It depends on the question.

CHAIR: As you would if you asked, 'Do you agree it's right for relatives, children, to urge their parents to top themselves so that they can get the money?'

Mrs Stokes: Indeed. It does depend on the question which determines the result.

Mr Muehlenberg: Some other questions would give quite different answers. In the survey, 'Do you think children have a fundamental right to be raised by their own biological mother and father?' which is connected to this debate, overwhelmingly the answer is yes, they do. So it depends on what we are asking.

CHAIR: I cannot speak for everyone on the committee, but we do understand.

Senator CAROL BROWN: Why do you think same-sex couples want to get married?

Mrs Stokes: I think it depends on who you ask. For some it is a matter of recognition, a legal recognition. We have one lesbian activist who says that she does not want to get married in terms of having the legal equality, but she is on the record as saying that their aim is to destroy marriage as we see it today if marriage is between a man and a woman and part of that is protection of children, which is why government and parliaments have actually legislated for marriage, to protect children. Certainly the Marriage Act talks about that. One of the things, in reading the Marriage Act this week, I was quite amazed to see the section on legitimacy. If a couple marry then their children are automatically legitimate. So there is this conferring of the family as actually protected by marriage in that sense. Some would say, I acknowledge, that they would want that as well. Certainly the studies from overseas, as Bill referred to, are that in some countries four to eight per cent—the maximum is about 15 per cent—of homosexual couples had actually married in countries where it was legally possible to do so. Very few actually choose to go down the route once it is legally possible to do so.

CHAIR: What is that statistic?

Mrs Stokes: There is a study, and I have a copy at the office, looking at all the countries that have legalised same-sex marriage. I think it was done by Maggie Gallagher of the National Organization for Marriage in America. The maximum was about 15 per cent, and in some countries it is only four to eight per cent.

CHAIR: How old is that? Do you remember?

Mrs Stokes: About five years.

Mr Muehlenberg: Five years. There are other studies going. We have only had, roughly, 10 years. Holland was the first country to go this way. All of the countries have been very consistent. Five or six per cent is the top, so they are not actually rushing down the aisle.

CHAIR: Thank you.

Mrs Kelleher: Senator, there is comment in the Patrician Morgan research about the uptake of same-sex marriage. There is a link to it in my submission.

CHAIR: That does not surprise me, with my limited understanding, but I think the argument is whether they do or they don't, they want the right to.

Senator CAROL BROWN: Do you think heterosexual de facto couples devalue marriage?

Mr Muehlenberg: The truth is that around 30-odd years ago when this was first being mooted marriage and family organisations actually made the very claims that this would be a marriage right situation, it would perhaps undermine marriage. What was also warned about, if we legalised de facto relationships, then surely the next step would be something like legalised homosexual marriages. Of course everybody was made fun of back then when we made such warnings and we said that there could be a slippery slope here. Of course now we are living in this very reality and saying the same thing.

Senator CAROL BROWN: De factos was the beginning of the slippery slope.

Mr Muehlenberg: It certainly was an alternative form of marriage, which many would have called a marriage light situation, in not having the same commitments and responsibilities, and therefore it would open the door to these other scenarios.

Senator CAROL BROWN: Why do you say they would not have the same commitment or responsibility?

Mrs Stokes: I will just pick up there. Recent research—and I was looking up the actual Australian Bureau of Statistics studies and information—shows that there is a far shorter time span of relationships in de facto relationships, so a child is much better protected in a marriage situation. Certainly, in some of the research coming out from Britain—I just read it a couple of weeks ago—it was several times more likely that, for a child whose parents were in a de facto relationship, they would break up by the time the child was five, compared to a couple that were married and had children.

Senator CAROL BROWN: Do you have any statistics?

Mrs Stokes: I have got the data for both of those at home.

Senator CAROL BROWN: Do you have that data that is relevant to Australia?

Mrs Stokes: Yes, and I was quoting Australian studies in what I did, but I mentioned the British one as well. But certainly, in the ABS figures, it is difficult in some cases to actually get that because for a lot of de facto relationships there is no registration. There is no acknowledgement, except perhaps in the census, as to who is in a de facto relationship. But—

Senator CAROL BROWN: I would have thought that Australia has come quite a long way from what used to happen when I was a child if children were not from parents who were married: the comments and bullying that occurred from people who were in marriage situations to the families who were not—which is a problem within itself. Of course, we now have a situation where that no longer occurs—or not that I have come across.

Mrs Stokes: But the recent data is, as I said, from the last census. The ABS articles that I was reading on marriage and divorce actually acknowledge that marriage is lasting a bit longer, about 12 years, but de facto relationships are actually much less.

Senator CAROL BROWN: That has not been my experience, but that is your view—

Mrs Stokes: It is not my view; it is the data from the Australian Bureau of Statistics.

Senator CAROL BROWN: No, I was talking to you, Mr Muehlenberg, about de facto relationships being the start of the slippery slope.

Mr Muehlenberg: Well, I think the evidence is there that it has been. The very arguments being used today by homosexuals—

Senator CAROL BROWN: I do not see how you can go from heterosexual relationships to where you are going. I do not understand how it is a slippery slope, how excluding couples from getting married—how that does not actually place a value on marriage. Why would you do that?

Mr Muehlenberg: There have always been exclusions. There has always been discrimination. I cannot marry; I am already married, so under law I cannot marry somebody else. Marriage has always been limited to two people. It has always been limited to a man and a woman. It has always been limited to those of a proper age, and it has always been limited to those who are not of a close blood relationship. So marriage has always in that sense discriminated or set up boundaries.

To widen that out, in this case to say two men or two women—the slippery slope is fully there. We have hundreds of groups now calling for polyamory rights, group marriage. They are saying the exact argument applies here. If 'a man and a woman' is no longer a quality or gender is no longer a criterion, why should number be a criterion? What if three people deeply love each other? The same arguments apply: 'We're adults,' 'It's consensual,' 'We love each other.'

The truth is that government has never been interested in mere love relationships. People have all kinds of relationships, loving and otherwise, sexual and otherwise, but governments have always had a keen interest in marriage simply because marriage is what brings about the possibility of the next generation. Marriage is that safe house for children to be raised in—which again the research is really quite clear on. Children do best, all things considered, when raised in the two-parent, heterosexual household, preferably cemented by marriage. There are hundreds of studies essentially on that issue alone. When we widen out the definition of marriage we effectively destroy marriage. It no longer means what it always has meant. Anything goes, and now we have the polyamorists and others making the very same arguments.

Senator HANSON-YOUNG: Just like interracial marriage, I guess.

Mr Muehlenberg: No, it is not at all like that, of course—apples and oranges.

Senator HANSON-YOUNG: Well, the same argument was made.

Mr Muehlenberg: Race is an inherent characteristic which you cannot change. Homosexuality is something—I have got testimonies. In fact, last time I was here with you we had an ex-homosexual giving his story. He is no longer homosexual. You cannot change race, but you can change your sexual attractions.

CHAIR: Anyhow, we are not here to debate; we are here to ask questions and get your views on life, whether we agree with them or not.

Mrs Stokes: Can I just say one thing on the idea of the benefit of marriage. I want to quote Professor Susan Brown, who wrote the article 'Marriage and child well-being: research and policy perspectives'. She reviewed all of the social science research on what sort of family formation was actually of benefit to children in the *Journal of Marriage and Family* in 2010. It is on page 18 of the National Marriage Coalition's submission. She wrote:

Over the past decade, evidence on the benefits of marriage for the well-being of children has continued to mount. Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms.

And she looked at a range of other family forms—stepfamilies, cohabiting and single parent families. She actually looked at things like educational, social, cognitive and behavioural outcomes. We are not talking about individual circumstances. We may know people who do well and their children do well and they may not be married or whatever. The social science research, as she points out, having analysed it, actually points to that outcome.

Senator CAROL BROWN: I would have thought that children brought up in a loving, caring family would do well.

Mrs Stokes: I am just saying what the social science research has found. She is not the only one who has analysed all the social science studies, but that is what they do. I know people who live in a de facto relationship and their children do well, but the studies say and the research data shows that de facto relationships on average last a lot less than marriage relationships and, as Professor Brown points out there, children living in married, biological parent intact families do better on average across all other family forms. I know we have personal experience of people we know—and they are not discriminated against like they were before; we are opposed to that sort of bullying or discrimination—but I am talking about what the research data shows.

CHAIR: I want to ask you a question not directly on the overseas marriages bill. My impression is that in the 1980s, the 1990s and perhaps the early part of this century there were a lot more people living in a de facto relationship. I am getting the impression that that is changing a bit. Do you have any comment or statistics on that?

Mrs Stokes: Again from reading the Australian Bureau of Statistics paper on marriage, divorce and other things, cohabitation has increased. The figures are there, but often cohabitation leads to marriage and often couples in their 20s and 30s do decide to get married. Years ago Bettina Arndt wrote an article about Professor Peter Saunders coming out from England. He was speaking at a conference and she wrote how he was literally booed when he said that he did not have anything to say about couples living in a de facto relationship but if they want to have children then they should get married. That is based on the social science research that shows that the commitment that comes from a formal, legal marriage is actually good for the children. He was booed at that conference but, again, that is what the social science research says.

CHAIR: Some would use that as an argument for why same-sex marriage should be legalised where there are children involved.

Mrs Stokes: Yes, they may well do that, but then we have the research that looks at that. We have the periodic studies, done by the Kirby Institute, of homosexual communities and relationships. They asked them about relationships, the length of relationships and so on. The relationships last less time and often involve multiple partnerships and so on. It is all there in the data again.

CHAIR: If no-one else has any burning questions—and we are out of time anyhow—then I thank you very much for your evidence. There are a couple of things you are going to get for us. We would like to have them as soon as possible. Thank you very much for coming along.

BROHIER, Mr Frederick Christopher, Lawyers for the Preservation of the Definition of Marriage

ROCHOW, Professor Neville Grant SC, Lawyers for the Preservation of the Definition of Marriage

[11:44]

CHAIR: Welcome. You have made a submission, No. 18. If you want to make any amendments or alterations to that submission, do so now. Otherwise, would you like to make a brief opening statement before we ask you some questions?

Prof. Rochow: We thank the committee for inviting us to speak to the submission we have made.

Mr Brohier: There is one correction we need to make to paragraph 14.2 of the submission where we say that there were problems with divorces for same- sex marriages in Canada. That has been changed by a 2013 act so that non-residents can obtain a divorce in Canada if there is consent by both parties and if there is no consent, they get a waiver either from the domestic court or from a Canadian court.

CHAIR: Can you say that again?

Mr Brohier: Yes. We say there were problems getting a divorce in Canada but that has been changed by a c2013 act. As we understand it, the position now is that non-residents can get a divorce in Canada if there is consent or alternatively, if they obtain a waiver from either a court in their country of residence or a Canadian court.

CHAIR: Thanks for that correction. Professor, do you want to make an opening statement?

Prof. Rochow: Yes. Perhaps the easiest way for us to make an opening statement is, if it assists the committee, distribute some materials we have collected, rather than giving you the material as we go along. We thought we would provide those to the committee as useful way for us to start. If that can be received as a bundle, I will speak to the bundle in a moment. Before going to my opening, could I give you a couple of things which fell from things being discussed in my last appearance. There was a reference to a case which had been decided here in Victoria regarding the letting of property. It is a Court of Appeal case, Christian Youth Camps v Cobaw, (2014) VSCA 75. That was a decision of the Court of Appeal handed down in, I think, May this year. Without going into it in any detail, it was a case where a homosexual youth support group contacted the Christian camp site and asked whether they could use camp site. There was a booking made until they learned that it was to be let to the homosexual youth group. They said, 'That is contrary to our faith. We can't let you have it.' Then action was taken against them by the equal opportunity authorities.

CHAIR: And the result?

Prof. Rochow: The result was that they lost at first instance and, two-one on appeal, it is now before the High Court.

CHAIR: On what grounds?

Prof. Rochow: The question was whether they satisfied the criteria for invoking the defence against discrimination on religious grounds. It was a fairly technical argument which involved a lot of international legal decisions. All I can say is that it is currently awaiting special leave some time in November this year.

The other item the was raised was the take-up of opportunity for same-sex marriage in jurisdictions that have allowed it. The latest information that we have available is one that was available in the press just yesterday which indicated that 351 couples had taken up that opportunity in New Zealand since it became law. That is in the last year. The first of those couples is now divorcing.

Could I just introduce you to the materials we have given you. We do want not want to say too much by way of an opening statement—we have made our position quite clear in the written material that we have provided to the committee. With Mr Brohier's clarification, they are really the submissions we would want to make and make ourselves available for clarification. What we have extracted and provided in the materials is as follows. The first set of documents in the bundle is an analysis of the demographics of same-sex marriage in Norway and Sweden. In Norway and Sweden they do not actually have same-sex marriage; what they do is register same-sex partnerships and treat it as marriage. That is the way it works in those jurisdictions. But they treat it as marriage. Looking at the registered relationships, a study was done by the equivalent of the ABS, which is the authority that analyses statistics for government purposes.

What you have on the first page is an abstract from an article that was written in 2006 that found that the rate of divorce among homosexual couples was greater than among heterosexual couples and greater among lesbian couples than among gay couples. That study was then followed up in 2012. What you have is the full report there

on the next page and that goes for some pages. The relevant passages for that for this purpose are probably at pages 18 and 19. We will not take you to those for the moment.

We raised in our submissions the question of the confusion as to the position where the wording of the act is by reference to country. If one were dealing with a marriage from the United States, it would be quite confusing, because the position there is far from clear. Only 19 jurisdictions among the states have taken it up and a number of those decisions, which have been made by judges in the first instance, are now subject to appeal. There have also been some decisions in recent times going the other way, where the trend does not seem to be as inexorable as was first thought. In the case of Borman and Borman, which is a decision at first instance of the Tennessee Circuit Court, the arguments that have been accepted in other first instance cases were actually refused on analysis. We are not sure whether that case is being appealed. That is a fairly recent decision.

Mr Brohier: The fifth of August this year.

Prof. Rochow: We do not know what is going to happen with that, but there is a careful analysis as to what the position is. That goes to our submission that we make in the paper that, if there were to be a same-sex couple from the United States saying that we would like to have our marriage recognised because our country recognises that, that would create an immediate legal confusion, because it is just not clear what the position of the United States is or will be. We understand that the first of those cases that are going up to the Supreme Court are likely to be heard at least at a interlocutory stage in the next term—that is, their fall term or our spring. Academic opinion on which way that will go is completely divided. That would be one ambiguity that might arise.

The other ambiguity, of course, would be in the case of Norway and Sweden, where they have same-sex partnerships but not marriages but they would want to have it treated as a marriage. What you do for a couple who have a registered relationship in Norway and Sweden? Do you treat that as a marriage or not?

There are a number of obvious debates that are waiting to be had if this is to become law. There is an ambiguity in the legislation itself.

The next tab that we have is an extract from *Hansard*. It is from a speech given by Senator Boyce on 20 June 2013 in relation to this bill. What we draw the attention of the committee to is the second paragraph in that speech, where she commences:

I am not normally in favour of backdoor ways of doing things, which is what this bill is …

We would commend that paragraph to the committee for its consideration, for two reasons. First of all, she calls the legislation for what it is. It is really a piece of wedge politics, attempting to put pressure on the wider agenda for same-sex marriage, which we say is not a good policy approach for any legislation. But, secondly, the logic that is used there is quite flawed and quite difficult to follow, because it is really breaching Hume's is/ought distinction. It is saying that, because other jurisdictions are doing it, we must inexorably do the same. It does not follow at all. It is not a question of trends; it is a question of what is right and what is right for this country. So we draw that to the attention of the committee.

There is then a paper that was recently delivered by Professor—

CHAIR: Can I just interrupt by saying the first line of Senator Boyce's comments there is about it being a backdoor way of doing it. I am not sure how much you heard this morning, but I might say that those both for and against acknowledged that this is a step towards the bigger issue.

Prof. Rochow: Yes. There is no debate about that, and we would accept that. The difficulty that arises from that sort of approach, we would submit, is that in the interim you have discriminatory legislation and a two-tiered approach to the question. So you either do the matter justice, if it has justice, by dealing with it in its entirety or you do not deal with it at all. This piecemeal approach, which is flawed at every level, in our view, should not be adopted.

Mr Brohier: We have been through a rigorous assessment of the issue. There was a parliamentary consultation in 2011 where MPs went to their constituents. There was a significant movement against same-sex marriage recorded in *Hansard* as everyone reported in the House. There was a Senate committee and a House committee—we appeared before both of them—and then the bills were defeated. So the issue has been thoroughly investigated in the last few years.

CHAIR: That is fine, although I suspect—perhaps my colleagues could tell me—that for current government senators there was not a conscience vote.

Mr Brohier: There was not a conscience vote, no. That is right.

CHAIR: With Labor was there a conscience vote?

Senator CAROL BROWN: Yes.

CHAIR: I accept what you are saying, but it is probably not a good reflection because on the coalition side it was a party vote.

Prof. Rochow: On that, could we just say that in discussions we have had with both sides of the House the indication is that even if a conscience vote were to be allowed it would probably be defeated on the numbers. But that is by the by. That is not really to the point. It is just an aside.

CHAIR: No, I appreciate that. Sorry, I interrupted you. Keep going.

Prof. Rochow: Not at all. The next item that we have is a paper that was recently delivered at the University of Adelaide by Professor Steven Smith of the University of San Diego. Professor Steven Smith is a leading constitutional commentator, both in the United States and in the world, and he delivered an oration at Adelaide university just two weeks ago. What you have there is his treatise on the three questions of equality, religion and nihilism.

What in essence he is saying is that equality of itself is an empty concept. It has to be informed by the circumstances and it invites precise parallels. So to talk about equal marriage is really a meaningless concept until you start making comparisons between the two types of marriage and see in what regards they are actually equal. Of course, in doing that we would say as a footnote to this that you are really bringing into question other types of relationships such as those that have been referred to already. A loving relationship of itself does not bring in all the equality that one would think. He does what we think is a rigorous analysis of those sorts of concepts and we commend that to the committee for its consideration. It is fairly philosophical, we know—

Mr Brohier: The last paragraph on page 19 is the key proposition. Essentially what he is saying is the debate should be about what marriage is, not equality, because equality does not add anything. The issue is: what is marriage? That is the open debate we should have as a community. There should be a vigorous challenge about whether a so-called union between two homosexuals can ever be marriage. That is the debate we have to have, not an equality debate.

Prof. Rochow: Yes. As I said, his track towards that is somewhat historical and philosophical, but his point is a solid one and it is a question that really should be answered by the committee in its deliberations.

Then there is the decision in the case of Hamalainen against Finland, which is on the next tab. That is the most recent decision of the Grand Chamber of the European Court of Human Rights. That judgement related to a suite of questions that were put to the Grand Chamber. It was only handed down in July of this year. The case was inviting the court to revisit the question of whether there is a right under the European covenants to same-sex marriage. That had been ventilated previously and it had been decided that there was no such right under any of the covenants that prevail in the European Union, which are obviously analogous to those that are provided for at the UN level as well. They said that there is no such right and they considered the matter again very carefully in Hamalainen. It is a very long decision. We would not want to take you through all of it, but if we take you to—

Mr Brohier: Page 24, paragraph 96.

Prof. Rochow: thank you—paragraph 96 on page 24, that probably captures the essence of what is critical in the decision. Schalk and Kopf in Austria is one of the earlier decisions where it was decided that there was no such right under any of the covenants. They are upholding that as being the position of the European Union now. So there is no source for the claimed right to same-sex marriage at the fundamental level.

Mr Brohier: The importance of that is that Senator Hanson-Young, in the explanatory memorandum, postulates that under the ICCPR, article 23, which is effectively the same as article 12:

This Bill enhances the right of men and women of marriageable age to marry …

That is, with respect, wrong on the authorities. The European Court of Human Rights is the most esteemed human rights court probably in the world and it has said that article 12, which is in effect the same as article 23, does not give a right to homosexual marriage. That has been the universal interpretation of article 23.

Prof. Rochow: There is a French decision too: Gas and Dubois.

Mr Brohier: Gas and Dubois, and we have given you the references in our paper. The proposition is that with an international covenant you cannot simply take a personal interpretation. It is an international covenant governing all the countries of the world and there would be an uproar, for example, if you postulated in Saudi Arabia or Iran that you could have same-sex marriage. You could not because sharia law does not permit it. So Senator Hanson-Young's reference to article 23 is, respectfully, wrong.

Prof. Rochow: That is the reason why we have given you Hamalainen. Then we have given you some commentary on some recent studies. Neither of us are sociologists. All we are doing is adducing the evidence there. We are not in any position to comment on the efficacy of them, but we do think that Professor Regnerus, in

that next tab, puts some fairly persuasive arguments as to why the most recent study that has been published—the Australian study of child health in same-sex families—is skewed in its logic and also biased in the demographic that it uses for its sample. He gives examples as to why there is a problem with that study and compares it to more rigorous studies that have been conducted both here and in the United States.

More importantly, we think for ease of digestion, Professor Crouse has in that next tab provided to *The American Spectator* an analysis of that same report by ACHESS. She, of course, was one of the authors of one of the greatest longitudinal studies in terms of child welfare. She goes through the report with some rigour and decides that it was biased in its choice of sampling; it was skewed in favour of those who had higher incomes and more education and so therefore really could not be seen as being representative, particularly because the people who were polled were self-registering which immediately brought a bias into the study itself.

Mr Brohier: In the second page of the Crouse article, in the top paragraph, she refers to a 'convenient sample'. It was not a poll. There was advertising in among homosexual magazines and people rang up and said what they thought about their own parenting. Both of these people say that is not a—

CHAIR: Thanks for drawing that out. As I have said before, we are politicians so we understand polling, but it is good that you highlighted that.

Prof. Rochow: We next have an extract from evidence that was given before the House committee in April of 2012 in relation to one of the predecessor bills. There are a number of passages in this *Hansard* transcript that we could take you to, but we take you to the last page of the bundle under that tab at page 63 where the evidence of Ms Argent is picked up. What is put forward, both at that section and in other parts of this piece of the evidence, is that there is nothing to fear in terms of introducing this type of legislation because there will be no repercussions for the Christian community or people of faith if they disagree with same-sex marriage. Now you heard some evidence before from Mr Muehlenberg and others saying that is not so. What is of concern is not so much the religious exemption that might be granted under some sorts of legislation at times—I think there was a reference to section 34C before?

CHAIR: I had it recorded as 37D, but do not take my word for it.

Mr Brohier: Can I just say there is no 37D in the Marriage Act.

CHAIR: That is why you should not take my word for it. There is apparently a provision, which everyone seems to accept is there, which says it is not discriminatory for churches—

Prof. Rochow: That is in the discrimination legislation.

Mr Brohier: That is in the discrimination legislation. The Marriage Act does not speak to that issue. It is in the various discrimination legislations.

Prof. Rochow: Yes, and that would be a template that is used throughout the discriminations.

CHAIR: That is my error, then. I assumed they were talking about the Marriage Act.

Prof. Rochow: Can I just say that that is one issue. An issue has been raised as to what happens when that is repealed: is it open slather? That is a point that may be debated at some stage. Our point is more in what we call the butcher, baker and candlestick maker cases, which is the people who are downstream in the religious faith community: so those like the camp that is being talked about, those who will not do the wedding cake, those who will not take photographs, those who will not hire out the hall and those who will not let out their accommodation because of fundamental conscientious beliefs. In the Cobaw case that I referred to before—and we do not have that here because we did not think it would be quite as relevant to what we were saying—Justice Redlich examines that issue very well. He puts the point very well. I think it is at paragraph 365, but I will get you the reference later on. His Honour puts it very succinctly. He says that it may be offensive to the homosexual who, as a matter of conscience, is refused a service, but it is just as offensive to the person of faith who has to provide it because, in the same way that sexuality is a part of our identity, so is faith a part of identity. So you have these clashes not just of ideals but of identity and there is no reason why one should trump the other. That is why he found that the exemption provisions did in fact apply. That is the question going up before the High Court.

The fact is that there have been several prosecutions. One is reported in the press at the moment where some bakers on Northern Ireland have refused to put two *Sesame Street* characters on the top of a cake in support of gay marriage. They are being pursued by the authorities there. The point is that same-sex marriage is not legal in Northern Ireland and they are refusing to make what is really a political statement but are still being pursued under the discrimination legislation. All we can say is that that cannot be accepted as being the case.

Then as an example we have the Mullins case, which is a wedding cake case where the bakers who refused it lived in one state where homosexual marriage was not permitted, a couple came from another state where it was

permitted, they wanted a wedding cake, it was refused and the bakers who refused had a number of very strict orders placed upon them including some retraining programs so that they would not behave in that way again. In other words, their conscience was to be retrained so that they could start acting against their faith. Then we have the appeal decision straight after that and the final order is made. You can read the order at paragraph 2— I am at page 2 of the order—with the remedy. You will see that they are to take remedial measures, that they are to provide quarterly compliance reports and that they are not to refuse use any more service. It is a fairly strong regime that they are subjected to if they refuse.

The last case in the bundle and the last document in the bundle as well is the New Mexico photography case. We will not take you to that. I think it speaks for itself.

Senator CAROL BROWN: Thank you for your information. I want to go to one part of your submission—point 39:

The relevance of this issue to the SSM debate is that in jurisdictions—

this is the relevance of the benefits of marriage—

where SSM has been legalised there is evidence that suggests a fall in the rate of marriages between men and women.

Why would same-sex marriage correlate to a fall in the rate of marriages between men and women?

Prof. Rochow: Firstly, that is just quoting the statistic. We have no idea of the causality of that. That is what the evidence presents itself as being.

Senator CAROL BROWN: So you have just put that there in the submission but you have not had a look into whether it is correct or not, or the cause?

Mr Brohier: We have given you the reference, respectfully, and the proposition that is advanced is that broadening a definition of marriage to include now same-sex couples demeans or lowers the estimation of marriage for the community and, therefore, that is the causative argument that seems to be suggested. Whether you agree with that or not—

Senator CAROL BROWN: Are you saying that is the argument put forward by David Blakenhorn or is that what you are suggesting now?

Mr Brohier: That is the argument that is put forward by David Blankenhorn, yes. We can provide you with the book, if you like.

Senator CAROL BROWN: That same-sex marriage devalues marriage? Sorry, I do not want to put words in your mouth.

Mr Brohier: That, by broadening the definition of marriage and changing it from what it always, always has been, it lessens, in the eyes of the community, the institution of marriage and, therefore, there is less uptake of marriage in the community. That is the argument.

Senator CAROL BROWN: Presumably, those men and women are just cohabitating, like de factos?

Mr Brohier: Yes, presumably.

Senator CAROL BROWN: And de facto marriage is not as good as a legal marriage?

Mr Brohier: If we are talking about enhancing marriage, de facto marriage is not marriage. It is de facto; it is not de jure. We are talking here about the institution of marriage.

Senator CAROL BROWN: Really, it is easy to say that people who enter into de facto relationships are the reason why there are not as many marriages. I just find it hard to see that same-sex marriage is the reason why heterosexuals are not getting married!

Mr Brohier: No, no. The proposition is that, in countries where there has been same-sex marriage, there is in the statistics a lessening uptake of marriage. That is put forward as a fact.

Prof. Rochow: It gives rise to the inference.

Mr Brohier: And that there are some causative issues which we have to debate. Now, that can be debated by sociologists. But we are looking at a situation where, for example, before same-sex marriage or registered partnerships were accepted in Norway or Denmark, there was cohabitation and there was marriage, and there was a marriage rate, presumably. Then you have an event—a legislative change—and then someone analyses the statistics and there is a falling-off of the rate.

Senator CAROL BROWN: So, presumably, with de facto relationships becoming more prevalent, the rate of marriage fell as well?

Mr Brohier: Clearly.

Prof. Rochow: It must be.

Senator CAROL BROWN: That is right. So I would have thought that same-sex marriage, when it is a marriage, would have added value to marriage.

Mr Brohier: With respect, what this evidence suggests is that you are wrong. It is really not what, respectfully—

Senator CAROL BROWN: All I have got is a line, so I will have to go and have a look at that.

Mr Brohier: Yes. It does not matter what you and I think here; it is what the evidence shows. This evidence is either correct or not.

Senator CAROL BROWN: This evidence does not show that at all. That is what you are telling me.

Mr Brohier: We have had to keep this submission within some constraints, but we can provide you with the information.

CHAIR: Are you saying, as a matter of fact, that the data shows that?

Mr Brohier: That is what the evidence suggests. That is what we have put in our submission.

CHAIR: And you agree with that?

Mr Brohier: We cannot agree or disagree. We can only proffer the evidence.

CHAIR: So there is statistical data saying there were x number of marriages before, and then—

Prof. Rochow: Exactly. That is really what we are saying.

CHAIR: It is a matter of numbers.

Prof. Rochow: We are picking up the argument where it says that, prior to same-sex marriage legalisation, there was this proportion of people choosing to enter marriage. There was an event and then there was a change in the proportion, and that is the only event that is socially recognisable as having any influence on the—

Mr Brohier: It could be that the moon turned blue and people got married less.

Prof. Rochow: But the evidence has not been adduced for—

Mr Brohier: But that is not what the evidence suggests.

CHAIR: Okay. Senator Brown?

Senator CAROL BROWN: I suppose it is about what evidence you are looking at. I have finished. Thank you.

CHAIR: I do not have any particular questions either. I thank you lawyers for your presentation, which I very much appreciated. Thank you for taking us through it, which obviated quite a number of questions that I might have had. I notice what I assume to be—I do not know them myself—a list of distinguished lawyers who have put their names to your submission. In a broad, general way, is your interest philosophical or legal, principally—from the group, I mean?

Prof. Rochow: The group is a group of lawyers, and it is both legal and philosophical because—

CHAIR: I can understand the legalities—

Prof. Rochow: Yes, and the philosophy comes in this way: it developed when we looked at the way in which the argument was progressing some time ago. Being lawyers, we are used to this dialectic of dispute: a case being put and a case being put against. The case was being put only in one way. There was nothing being put forward on the other side so that there was some sort of dialect of dispute, there were necessary contradictors of the evidence that was being adduced. We could see flaws in the arguments—in fact, the High Court has vindicated some of the arguments we put forward—but no-one was examining the constitutional argument, no-one was examining the evidence of what was going on overseas legally, so we started gathering that evidence and we adduced it.

CHAIR: Okay. Whether or not we agree with your conclusions, thank you very much for putting those.

Prof. Rochow: Just on that point, Senator, it started legal but it has morphed into philosophical as well as we have studied the issue more. Are there any more questions?

CHAIR: No.

Prof. Rochow: There are just a couple of points I wish to make on the explanatory memorandum.

CHAIR: Quickly, because we have run out of time.

Prof. Rochow: I have addressed article 23. Article 26 is also proffered. That is again, respectfully, wrong because the ECHR has said that there is no discrimination in countries not allowing same-sex marriage because article 12—which is the equivalent of article 23—does not speak to same-sex marriage at all. Then the reference to article 12 of the International Covenant on Economic, Cultural and Social Rights is, again, really stretching the point, we say.

CHAIR: I am afraid I have not followed the European courts. I am a lawyer of old and I only ever dealt with the Queensland courts.

Prof. Rochow: That's pretty international to a lot of us!

CHAIR: Is the European Court of Human Rights well regarded?

Prof. Rochow: Extremely highly regarded because the covenants in Europe are the equivalent of the UN covenants in virtually every particular and it is the only court active in this area where it is pronouncing specifically on those covenants on virtually a daily basis because every citizen in the EU has a right of action against their government if they feel they are discriminated against in some way and then that is taken on to the court. So the court is very active in dealing with individual rights against states.

CHAIR: Is it the court of ultimate determination?

Prof. Rochow: It is.

CHAIR: So there is no appeal from that?

Mr Brohier: There is a first instance, then there is a grand chamber.

Prof. Rochow: In fact, what used to be the House of Lords, now the Supreme Court is subject to the ECHR now under the covenants that Britain has entered into.

CHAIR: Really?

Prof. Rochow: It is, yes.

CHAIR: And this decision is of the full chamber, is it?

Prof. Rochow: That is the grand chamber, yes. That is their full court and that is as high as it goes.

CHAIR: Okay. Thank you very much for appearing.

Prof. Rochow: Thank you for the opportunity, we appreciate it.

Proceedings suspended from 12:23 to 13:13

BRIFFA, Mr Tony, Vice President, Organisation Intersex International Australia Limited; Vice President, Androgen Insensitivity Syndrome Support Group Australia Inc.

CHAIR: I call back to order this hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiring into legislation regarding recognition of foreign marriages. I welcome Tony Briffa to the table to give evidence. I can indicate to you, Tony, before we start that these are proceedings of the parliament and parliamentary privilege applies. If there is anything that you want to say in camera you should raise that with the committee for consideration. Perhaps I should elaborate on that. The committee prefers evidence to be given in public, but under Senate resolution witnesses have the right to request to be heard in private session. It is important that a witness give the committee notice if they intend to ask to give evidence in camera. I understand you have indicated to the secretariat that you do want to do that.

Mr Briffa: That is correct.

CHAIR: Are you happy to proceed?

Mr Briffa: I am happy to proceed publicly, and then, if there are more personal matters, we might go in camera, if that is okay.

CHAIR: Well, you carry on and, at the appropriate time, you ask us and the committee will then determine if that should happen. I am sure we would accede to your request, but we will deal with that when it comes up.

Mr Briffa: Thank you very much.

CHAIR: Welcome and thank you for your submission, which was No. 40. If you want to amend or add to it you could do that now, otherwise you could give us a brief opening statement.

Mr Briffa: Senators, thank you very much for having me here today. The Recognition of Foreign Marriages Bill is one that is personally very important to me and it is also important to people that I represent. I am here as Vice President of Organisation Intersex International Australia Limited and the AIS Support Group Australia. Both of those organisations are the Australia-wide intersex organisations. I said the word 'intersex' a few times there—what is intersex? People often confuse it with gender identity, or being trans, or being all sorts of things. It is actually about biology. I was born with a condition, with a variation that meant that I am partially male and partially female. It is a challenge at the best of times for many of us, but that is just the way nature made us. If you like to use the religious parlance, it is the way God made us. We cannot help it, it is the way we were born.

The bill before us is important to me. It is particularly about same-sex marriages solemnised in foreign countries. It assumes that people are either male or female. In Australia marriage is between a man and a woman to the exclusion of all others. This bill would allow marriages from overseas solemnised between two women or two men to also be recognised in Australia. The problem we have is that, for some people like me, it is not as easy as that, it is not as black and white as that.

I got married in New Zealand 11 months ago. I have my marriage certificate here, which I will table, and you will see on that certificate that my sex on my marriage certificate is not male or female. It says 'indeterminate'. I would have preferred, personally, that the sex would have reflected more accurately my sex, being part male and part female. They do have an option of 'indeterminate' in New Zealand and I chose that option, because that more accurately reflects me. I am fierce about being true to myself. I do not want to have to pretend, particularly in legal documentation, that I am one or the other, because I would be denying a part of myself.

I was raised as female. My first birth certificate said that I was female. I had a wonderful childhood and everything. I went to a Catholic girls school that I visited earlier this week. They invited me back. I am a former mayor of my local area, and I resigned from the council only a couple of years ago.

CHAIR: Which area?

Mr Briffa: The western suburbs of Melbourne.

CHAIR: Which council?

Mr Briffa: Hobsons Bay City Council. It is in the western suburbs of Melbourne, including Williamstown, Altona, Laverton and those sorts of areas.

CHAIR: I have interrupted you, which I should not have done—

Mr Briffa: That is okay.

CHAIR: But while I have: are you happy for this to be part of the record so it is a public document?

Mr Briffa: I would like some of it redacted, if possible. There is personal information and addresses in there. I am happy for most of it but would like some personal details redacted.

CHAIR: I was going to ask whether it adds to the evidence to have it at all, but it probably does. We will get a copy and give it to you and you can redact whatever you want to. Are you happy with that?

Mr Briffa: I am very happy for that. I do think it is an important document because it does show that other countries—and we are talking about the recognition of foreign marriages—recognise people who are not just male or female but are something else. Indeed, the High Court of Australia only this year recognised a non-intersex person as having a gender that was not male or female but neither. So there are issues about that.

Even with the current Marriage Act I am not sure who I can marry. In fact, it is a terrible situation. I technically could have married my wife in Australia but I would have had to have been a man to do it. I would have to forget the female part of me, accept the male part of me, have a male birth certificate—and I have had a female birth certificate, a male birth certificate and a blank birth certificate—be in a heterosexual relationship and have that recognised to be able to marry in Australia. I could have married her that way, but I am not her husband. Physically, if you like, I am not her husband, so it would be very strange. I would always be worried about what that would mean in the future. Would someone invalidate my marriage if I get older and am in a nursing home or have had a car accident, because when I go to a nursing home or a hospital they would be able to identify that I am not male?

This is probably confusing. My particular intersex variation is called androgen insensitivity syndrome. I am genetically male and was born with testes that were internal but no male genitalia; in fact, I have female genitalia. So I am biologically both male and female, or at least part male and part female. I have been raised as a female and have tried to accept as best I could that. I had a wonderful life that way. I was married to a man and we divorced. It was very difficult to accept being a woman because I knew at the same time that I was born with internal testes that were removed when I was a child and am genetically male. I was very good at sports. I was very keen to pursue that, but I knew that if I were tested there would be all sorts of questions and publicity about my gender and my sex, so I could not pursue that.

I would have loved to have been able to have children, but I could not because of my condition. That did make me question how much of a woman I am if I was not even born with a uterus? Yes, I was born with a vagina but I have no uterus or ovaries, so I cannot have children. Thankfully, I was able to foster children and have had two wonderful kids, who are now adults. I was able to become a parent in other ways.

I also then tried living as a man and had my birth certificate changed—or should I say 'corrected'—under the provisions of the births, deaths and marriages act. I had another birth certificate issued. I am an aerospace engineer and work for the Department of Defence. I was very open about it. I was on *60 Minutes* in 2000 before I started working for Defence. I have to say that even Defence were fantastic. During the job interview I forgot that my academic transcripts had my previous names—I was raised as Antoinette. At the time I was going for this job application I was Anthony Briffa. During the interview my academic transcripts obviously said Antoinette Briffa, and the wing commander asked me about whose academic transcripts were they. And I forgot, because I do forget about the whole intersex thing, so then during the interview I explained my journey in having being born with an intersex variation, and the wing commander reassured me that that would have no effect at all on the application.

CHAIR: I think they were after your brain.

Mr Briffa: Exactly right. I got the job and I had a wonderful career within Defence. After that I worked for the Federal Police and did things like work in the Solomon Islands as part of RAMSI, and things like that. Look, there were issues there, as in some personal issues. For example—and do not get me wrong; the AFP were brilliant about everything—I chose not to speak and raise issues that I had: things like living on a military base when you are biologically different. I never used the shower block that I was supposed to use, for example. I would always go to the swimming pool on base and they had a shower—it only had cold water but at least it was in the Solomon Islands so it was pretty warm—and I would use those showers. Then I had my public life as a councillor in my local area where I was born and grew up, went to the local Catholic girls school and everything, and then become Tony Anthony. I was elected to the local council as an independent councillor and people knew my background and everything, and I am so grateful that people were very accepting of me being so open about it to the point where I was elected mayor in 2011—I think it was—and then re-elected in 2012.

I say all of these things not to try and big-note myself in any way but to say that society are really accepting of people who are different. Society know about those of us that do come out. A number of us do not come out because we are scared of what the repercussions will be. For example, I know women in the support group that are married and whose husbands do not even know that they have an intersex condition—they do not know that their wife has an intersex condition. We worry about what would happen if people find out. Would it mean that the marriage is invalidated, because marriage under the Marriage Act at the moment is between a man and a woman, to the exclusion of all others? Would the marriage be annulled?. I must admit I was worried when I

separated from my husband about whether he was going to try and get an annulment on the basis that our marriage was not ever a proper marriage because I was not really a woman.

I would just like to also tender these and perhaps would like those redacted somewhat as well. Both of those are statutory declarations from doctors, the first one being from Professor Garry Warne, formerly of the Royal Children's Hospital in Melbourne. He is now retired. He is one of the leading expects in the world about intersex people and sex variations. He treated me as a child and we have continued to have a relationship, continued to know each other and be friends, for all these years. He—as you see in that statutory declaration—supports my position that I am biologically male and female. Additionally, there is a letter from my general practitioner that also supports that, because that is exactly, biologically, what I am. I probably do not need to give you birth certificates to show the different things over the years.

I do want to mention that even the Attorney-General's Department, in their understanding of the bill, has confirmed that this bill is about same-sex marriages. So it is not about marriage equality and recognising all marriages—such as mine. It is same-sex marriage only, which means that—if passed—I would become one of the few people in Australia that cannot actually be legally married. It is not exactly the situation I would want to be in, and I would love for Manja and me to eventually have our marriage recognised in this country.

CHAIR: It is recognised in New Zealand.

Mr Briffa: It is recognised in New Zealand and in a number of other countries. I am a dual citizen; I am also Maltese. Manja, my wife, is also Dutch. She was born in the Netherlands. Our marriage is recognised in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand and a few other countries.

CHAIR: Are there any countries that recognise male-male or female-female marriages that do not recognise—

Mr Briffa: Others?

CHAIR: your situation?

Mr Briffa: Yes. There may be. There may well be. I am not sure. Thankfully, New Zealand does. We chose to get married in New Zealand because it was close. We were actually going to go to Canada, but New Zealand was close and their laws allowed for 'indeterminate' as well. But there probably are other countries that only consider male-male, female-female and male-female marriages. There probably are. And that is unfortunate, but we are slowly getting there. We are slowly raising awareness that there are people that are not just male or just female. There are people like me who are biologically both, and it is not because I am a gender warrior or a whatever—in fact, it is not even about gender. I do not even understand the concept when people talk about gender identity and gender diversity. I was born this way so I identify with the way that my body was born. I think most people in society are like that. So it is just about having that recognition. I do not want to keep pretending that I am one or the other. For society, I am very happy to go along in life having people call me whatever they want to; but, in formal documentation, I want to be recognised as being what I really am.

I have a 27-year-old nephew, who was diagnosed with cancer, unfortunately, and it is terminal; it is stage 4 cancer. One of the things I spoke to him about as soon as he was diagnosed was: 'What are the things you want to do before you die?' He wanted to marry his fiancee, so I organised his wedding. I went to Births, Deaths and Marriages here in Victoria. There were big walls with artwork all around talking about registering the important events in people's lives. Well, my nephew got that. His event was recognised because he happens to be heterosexual. But my marriage is not recognised in this country.

My wife is a schoolteacher. We are both, I would say, decent, hardworking, regular people that contribute to society. In addition to all the other stuff that I said I did, I am a local bail justice, I am a justice of the peace; I do all sorts of things. I just want to be able to live, be married and do all those sorts of things like other people, and I do not think it undermines anyone, anyone else's relationships, anyone else's marriage. I certainly do not think it undermines marriage. In fact, if anything, we are strengthening it. We are actually saying: marriage is really important to us, so important we went overseas to get married, which meant we did not get married in front of our family and friends. But, when we got back, we then had a big celebration in our home in Altona Meadows and celebrated it with family and friends there.

I have lots of friends in the Church. I was raised Catholic, I went to a Catholic school and everything. I was back at my school this week, speaking with some wonderful people, the nuns. In fact, my vice-principal is the first cousin of Cardinal Pell, and she is a wonderful lady. Sadly, she passed away a few months ago. But nobody there had an issue with my marriage and our marriage. It is just a shame that under the law, as it is at the moment, it is not recognised.

CHAIR: So the nuns had no hesitation about it?

Mr Briffa: No, not at all. In fact, they sent me a card when I got married. It was so beautiful. They sent me a card of Mary McKillop. They are Josephite nuns and they are wonderfully supportive. They understand that I was just born this way.

CHAIR: Did the cardinal send you a card!

Mr Briffa: No, no. I do not know the cardinal. I do not know him at all. But his cousin came to my 40th birthday, and she is lovely—or was lovely; as I said, she passed away.

I am very happy to take any questions and I am also happy to take questions of a personal nature. I know that it is not a typical thing to be speaking about, being intersex. It is very hidden and most of us are not out, as I said. It is more common than you think. About one in 1,000 people are born like me but because of the shame and stigma attached to it, we are just not out.

CHAIR: How is your partner classified?

Mr Briffa: She is a woman.

Senator CAROL BROWN: Thank you for sharing your story with us. We have had other comments in submissions about amendments that would improve the legislation to deal with intersex people. Do you think we would need to amend the legislation or would there be a need for separate legislation?

Mr Briffa: I would say to amend the bill. This is going to be contrary to what some people like but currently we have guidelines in Australia for passports. You can get an X passport. That is great and it is very progressive. I would not want an X. I cannot imagine going through customs in the Middle East or other places with an X on my passport. I know friends who have and they are okay with that. I do not want to raise any awareness to any sort of difference. With this legislation I do not want segregation of intersex or a definition of intersex. In my opinion it should just be that marriage is about two people, irrespective of sex. That would be the easiest way to include everybody. You would not need a definition for intersex or gender-varying people or anything like that. It would just be that marriages are recognised from overseas irrespective of the sex of the couple.

CHAIR: What would you do with the passport?

Mr Briffa: Ideally in passports and on birth certificates there will not be any sex marker there at all—ideally. I have passports that are male and female and personally I just pick whichever one is safest. I had a male one that gave me all sorts of grief at Sydney airport going through customs. They have those body scanners now and I was questioned about my sex. I ended up getting search. They did not bother to search my backpack at all; it was just about a physical search of me. So I ended up getting my passport put back to female to make it easier to go through customs. I work in engineering so work largely sees me as a male. If they booked tickets for me as a male and I then present with the female passport, it is not easy. I am what I am so maybe I would like my birth certificate to say male and female. It is funny.

Like all intersex people, I consider myself to be one of the few classes of people in this country who cannot have a birth certificate which recognises what they are. Even a trans person, a person who is born one sex and identifies with the other and starts living as that opposite sex, they can get a birth certificate which recognises their affirmed sex. I am biologically born this way but I cannot have a birth certificate that acknowledges what I am because birth certificates at the moment require that you can only be one of the other or you could have 'indeterminate'. I am not indeterminate; I know what I am. My issue with the X personally is that it sets up a situation where you have males, you have females and then you have something that is outside of that—you have an X. I am not outside of that. I know what I am. I am actually part male and part female. That is why I do not particularly like the X.

CHAIR: I suspect it is an identifier, as is your birthday for security and all those sorts of things. You raise some interesting issues, not directly germane to this bill.

Senator CAROL BROWN: You also mentioned your view about how allowing two people to get married would enhance marriage. We have heard a lot of evidence here today—and more so in the submissions—that that is not the case and that there is lot of evidence out there that supports that not being the case. Would you like to elaborate on your view?

Mr Briffa: I would love to invite them to my house, for them to meet the kids that I have fostered over the years and to walk in my community. Possibly the media is to blame. When you see the gay community and gay and lesbian couples depicted in the media, the media is very keen to pick up on the more, shall we say, extravagant couples. If they looked at most same-sex couples or even people like me, they would see that there is

nothing against the church about it. It is just two people who love each other who want to form a family—and that is what we have done. I cannot imagine many people, including churches, having an issue with my marriage.

As I said, I am from the western suburbs of Melbourne. We have a large Catholic population and a large Muslim population there, and I have had no issues—even as a public officer—being an intersex person. I was an elected councillor when I was married. It was all reported in the local newspapers, and there were no issues whatsoever. In fact, as I said, I received cards from the local convent, which was lovely.

Senator CAROL BROWN: So the evidence that we received that allowing same-sex marriages—or, if there was an amendment, allowing two people to get married—that there would be a fall in the rate of marriages between men and women would not be—

Mr Briffa: I cannot imagine that being the case. I should also point out that any of the churches making statements about that I suppose were talking specifically about same-sex marriages and not marriages like mine.

Senator CAROL BROWN: Same-sex marriages.

Mr Briffa: So they were not talking about marriages like mine, where someone was born this way—though I hate to use that terminology. There was no choice or anything like that about that. I have never heard any Catholic or religious organisation having an issue with intersex people and our relationships.

Senator CAROL BROWN: In your view, though, if we were talking just about same-sex marriage, do you think that is a reasonable thing to say?

Mr Briffa: Absolutely not. Most people in society think that we already have marriage equality. To put on my hat as former councillor, when I was a councillor the City of Hobsons Bay passed a resolution supporting marriage equality and we officially wrote a letter on behalf of the City of Hobsons Bay supporting a previous inquiry of the parliament.

Senator CAROL BROWN: How did that come about?

Mr Briffa: I put up a motion to the council. That was discussed and debated and it was actually passed unanimously. As I say the council in the western suburbs and Hobsons Bay City Council are often divided, but—

CHAIR: It was probably the only unanimous resolution in history.

Mr Briffa: One of the councillors is a Baptist and I am Catholic and it was a unanimous decision. Did we get an outcry from the community? No, and that has been case with any of the things that we have done for the GLBTI community in Hobsons Bay—though I do remember that the Rainbow Flag which was outside the council chambers was stolen once But I am not sure if that was because they did not like it or because they actually wanted the flag.

Senator CAROL BROWN: What was the reasoning behind you wanting to put up that resolution?

Mr Briffa: I knew that there was a letter-writing campaign by one of the local churches asking people to oppose marriage equality, and my mother was in church that Sunday and she was very upset about it and other people came to me and said that they were upset about it. So I thought that we should have a public discussion about whether or not we as a community supported it. The community at first was surprised that we did not already have marriage equality and was quite happy to see that resolution passed.

Senator HANSON-YOUNG: Thanks, Tony. Firstly, I think it is really important that we as a committee get to hear the personal stories. I just want to thank you for being so comfortable and open and honest with us because it is really refreshing.

Mr Briffa: Thank you, I was thinking of going in camera for some of the first little things, but I did not so it is okay.

Senator HANSON-YOUNG: I think it is really important.

Mr Briffa: We want people to understand because people think that we might be gender warriors or gender queer and all of that, and we are not; we are just people who happened to be born this way. If people could be accepting of that. We just need to raise awareness that we exist. Legislation like the Marriage Act 1961 and the Recognition of Foreign Marriages Bill 2014 just needs to be inclusive of us. There have been huge steps recently: the anti-discrimination legislation recognising intersex, including the attribute of intersex status and the Senate inquiry into the forced and coerced sterilisation of intersex people in Australia. In recent years there have been huge steps made by the parliament.

Senator HANSON-YOUNG: Absolutely. I just want to assure you that I have heard what you have said and also a number of the other submitters in terms of the wording of the bill. I take all of that on board and support amending it to be talking about marriage between two people and taking out the gender specification.

Mr Briffa: Wonderful.

CHAIR: You have made a commitment to your partner, wife?

Mr Briffa: Yes, wife. I call her my wife.

CHAIR: Which I suggest is the most important thing. What is the issue? What do you miss out on in view of the fact that other people do not recognise your marriage? Economically you have all the rights—I assume you have all the rights—of same-sex couples in relation to property et cetera.

Mr Briffa: I am going to get a little bit emotional here, sorry. This is a former partner of mine, her name is Zina Kambouroudis. She passed away three years and one month ago. Zina and her wife were not recognised as being a married couple. Her partner's name is Mandy. Through the year and a half of palliative care, chemotherapy, radiation and surgeries and all that sort of thing they were not recognised as a couple at all. Even in palliative care, when it was the final days, and I was there as well, nursing staff were happy to usher Zina's partner out of the room so that the mother could go into the room because they were not recognised as being married. There was nothing there to recognise it, so they automatically gave rights to the parents, but not to the partner. She was manager of avionics at Virgin Australia, very well loved and had just completed her masters six months before she was diagnosed with cancer. Her death certificate lists her as being single because it does not recognise the marriage, or the relationship. Yet things like the parent's occupation was listed, but something as significant as her relationship status was not. Things like speaking to the undertakers, organising the funeral, the gravesite, it was all—

CHAIR: It is a long time since I practised law, but is there not power of attorney or some sort of legal document that says this person has the decision on whether you turn off the machines and the like?

Mr Briffa: Sure, there is. You can do things and I have not even done them yet—you see, that is the thing. If we were in a recognised relationship, I would not have to do that. But, automatically, you would change your will, have medical power of attorney and enduring power of attorney, including financial power of attorney, and set those things up and then have the documentation. If you do not think about doing those things and if I get hit by a bus today on the way from this room back to the office, my wife will not have any rights.

CHAIR: You had better do that, just in case.

Mr Briffa: That is right or she will not have any rights.

CHAIR: Or look out for buses. If you were in one of the states that had civil unions, or the other terminology for it that was mentioned earlier today for one state, would that address those issues?

Mr Briffa: It would address some of the legal issues, but then it sets up a dichotomy where some people are good enough to be married and some are not good enough to be married—some people have the rights to be married and other people do not.

CHAIR: I can understand that, but rights and responsibilities are things that can be addressed.

Mr Briffa: To me, it is like the civil rights movement in America and saying, 'It's okay for the black people to sit at the back of the bus because ultimately they still get to their destination.' It sets up a 'you and them'.

Senator HANSON-YOUNG: Even if you were in the ACT, and Tasmania has a different level of civil partnership recognition, yes, you may have legal rights because of that, but in the situation that you have described you would have to ensure that all of those institutions and individuals recognised what that civil partnership means legally, as opposed to marriage which is understood. Do you know what I mean?

Mr Briffa: Yes.

Senator HANSON-YOUNG: It is not like every nurse in a nursing home or every undertaker is going to understand the legal ramifications of a civil partnership in a state.

Mr Briffa: That is certainly what happened with Zina in her dying days at the palliative care place. Because there was no marriage, the partner was treated very, very differently.

CHAIR: How would that situation apply in the case of a defacto couple?

Mr Briffa: In a heterosexual defacto couple?

CHAIR: Yes, sorry.

Mr Briffa: Vastly different because people recognise a male-female couple. I imagine it would be different.

Senator HANSON-YOUNG: Different social understanding—do you mean?

Mr Briffa: Yes.

CHAIR: As far as the nurses not allowing your friend's wife to be in the room, how does that then apply to a heterosexual defacto couple? Do they have to show some certificates? You are not an expert in this area and I am asking you things that you do not have knowledge of.

Mr Briffa: If I could step away from same-sex marriage and talk about my marriage. If I was forced to undergo a civil union instead, by virtue of the way that I was born and not any other attribute—the colour of my skin, say—that would mean I would not be entitled to marriage; I would have to go through a civil union.

CHAIR: But you are no different. It is little comfort, but you are no different to male-male, female-female couples in that regard.

Mr Briffa: I am very different because I cannot marry anybody.

Senator HANSON-YOUNG: You cannot choose to marry anyone.

Mr Briffa: I cannot be legal to marry somebody of either sex. I am in a different situation. I am in a situation where if Manja was a man I would still have legal issues about being able to married. If Manja were a man, I would have to a woman and then I would still be concerned that because of my genotype, my genetics, by virtue of the fact that I was born with testes, my marriage could be invalidated because marriage is between 'a man and a woman to the exclusion of all others' and I am not a man or a woman. I am born part both.

CHAIR: But same-sex couples fit the same—

Mr Briffa: But they can, not they would but they can—they have the legal ability to—marry somebody of the opposite sex. I cannot marry someone of the opposite sex, the same sex, another sex.

CHAIR: I can understand—

Mr Briffa: Try living it!

CHAIR: When I say I can understand I mean I can very remotely understand the issues you have had during your life. I think everyone would recognise the situation you are in.

Mr Briffa: I do not complain about it, but it is things like going through airports, travelling and, while in the main cities it is okay, if I am a rural area what bathroom do I use? If someone goes 'mate' then, okay, I am a mate, I am a guy. If it is 'Hi, lovely!' then, okay, I am that. It is just picking up cues and going along with it. That is what I do, I just go along with whatever it is.

CHAIR: I call everyone 'you guys' these days, it's easier! Thank you very much, I have had a very interesting discussion, perhaps not directly germane to recognition of foreign marriages, although you certainly gave us your own situation. All the best for the future. Doing these sorts of inquiries must be very easy compared to being mayor of Hobsons Bay over the years.

Mr Briffa: Being mayor was a wonderful experience and a great honour, especially because it was the area where I grew up, where I had all those challenges and where the community said, 'None of that matters to us, you're a good person and we're happy for you to be our councillor and mayor.'

CHAIR: I think that is the general Australian view on those sorts of things.

Mr Briffa: Yes, I think so. People are very accepting once they understand it. If there are any church groups that are opposed to my marriage, once they understand what the situation actually is they are fine, they are very accepting, because God made us this way.

CHAIR: Thank you very much for your attendance.

Mr Briffa: Thank you, Senators.

BRADIN, Ms Clare, Member, Young Lawyers Section, Law Reform Committee, Law Institute of Victoria

GARDINER, Mr Jamie, Member, Human Rights Committee and LIVout Working Group, Law Institute of Victoria

KENNEDY, Mr Nathan, President, Australian Lawyers for Human Rights Inc.

[13:59]

Evidence from Mr Kennedy was taken via teleconference—

CHAIR: Welcome, Mr Kennedy, and thank you very much for joining us. You are in a panel with Ms Clare Badin and Mr Jamie Gardiner from the Law Institute of Victoria. Apologies to everyone from Senator Collins. She was with us but her husband is not well and she is with him. We have submissions from both groups: The Australian Lawyers for Human Rights, which is submission No. 21; and the Law Institute's submission, which is No. 39. Do you wish to amend or add to your submissions? If you do, now is the time to do it. If not, I will get you to make a brief opening statement and then the committee will ask you some questions. I remind everyone that these hearings are treated as proceedings of the parliament and parliamentary privilege does apply. If there is anything you want to deal with in camera, you should let the committee know and the committee will consider that.

Ms Bradin: I appear on behalf of the Law Institute as a member of the Young Lawyers Law Reform Committee. Also appearing on behalf of the LIV is Mr Jamie Gardiner, a member of the Human Rights Committee and the LIVout Working Group.

Committee members will be aware from our submission that the LIV's position on the bill is informed by our longstanding support for marriage equality in Australia. The LIV maintains that denying same-sex couples the right to marry is an unjustifiable restraint on individual freedom in violation of Australia's human rights and other international legal commitments. We note that the bill does not address all discriminatory aspects of the Marriage Act and, therefore, urge the parliament to undertake a full review of the act and to amend all discriminatory provisions. However, it is our submission that the bill is an important first step towards securing marriage equality in Australia. We, therefore, support the bill subject to two important amendments, which I will touch on shortly.

In taking steps to legally recognise same-sex marriage solemnised overseas Australia would follow a number of other countries that recognise foreign same-sex marriages but do not allow such marriages to take place at home. Our key concerns with the current section 88EA of the Marriage Act are as follows. Firstly, in providing that foreign same-sex unions must not be recognised as marriages in Australia the LIV considers the section breaches Australia's obligations under the Hague marriage convention and under the International Covenant on Civil and Political Rights. Secondly, failing to recognise foreign same-sex marriage offends international comity in relation to the 19 nations whose marriage laws do not discriminate against same-sex couples. Finally, the section prevents same-sex couples married overseas from accessing the Australian family law system on an equal basis to other couples married overseas. For example, the current section prevents these couples from obtaining divorce under Australian law.

Committee members will be aware that the Law Institute make suggestions on two key amendments to the bill to ensure that the proposed reforms are more effective in fully recognising the equal rights of people to marry. Firstly, we highlight that the proposed new section 88EA may lead to an anomalous situation where unions recognised in a foreign country involving intersex or transgender persons may not be captured by the operation of this provision. The issue could be dealt with by removing the express references to 'a man and another man' or 'a woman and another woman' and replacing these with the phrase 'two people'.

Secondly, the bill does not address section 88B(4) of the Marriage Act, which specifies that marriage has the same meaning given by subsection 5(1) of the act in the context of the recognition of foreign marriages—that is, the definition of marriage is confined to between a man and a woman. This inconsistency could be remedied by repealing section 88B(4). Do you have anything you would like to add to that, Jamie?

Mr Gardiner: I think it might be appropriate to mention and acknowledged Senator Hanson-Young's agreement when speaking with Mr Tony Briffa before, that is the first point that you just made then about two people, is obviously one that is being considered. We are very pleased to hear that. That is all we need to say in our opening statement and we would be delighted to receive questions.

CHAIR: Mr Kennedy, do you have an opening statement?

Mr Kennedy: Yes, I have a very brief opening statement. Firstly, I would agree with what the Law Institute of Victoria have said. Marriage is a fundamental human right, a right that is currently denied in Australian law to those who are attracted to members of the same sex. Sexuality is an inherent characteristic. To deny a person their

rights based on such a characteristic is as abhorrent as denying them their rights on the basis of their race or gender. The Marriage Act in its current form is deliberately and specifically discriminatory and must be amended. It is past time that Australia recognised in domestic law the right of same-sex couples to marry. The passage of this bill will go some way to addressing this. Australian Lawyers for Human Rights strongly supports the passage of this bill.

Senator HANSON-YOUNG: I want to ask your opinion from your legal perspective about the criticisms made by some other submitters that this bill would impact on the religious freedoms of religious organisations. It has been reiterated a number of times in various submissions and in evidence given to the committee. Would you be able to address that?

Mr Gardiner: The answer is that it does not. The notion that a secular state could recognise the laws of other secular states as valid laws extending along the usual rules of private international law and that that somehow interferes with religious freedom of people in that state or this state is one which is so far-fetched as to be difficult to take seriously. I do not recall—I am not aware of any campaign by such people about the fact that Australian law already, for those same reasons, recognises as valid foreign marriages such as polygamous marriages, which cannot be celebrated in Australia but they are recognised from overseas, and I imagine that that would offend the same set of religious freedoms. If it does—and I do not think it does, and I do not think that your bill would—then I think this is an entirely spurious and fallacious assertion.

Senator HANSON-YOUNG: Mr Kennedy, do you have anything to add to that?

Mr Kennedy: I have not read what they have said in their submissions, but I just cannot see it in the text of the act. We are dealing with secular marriage. There is nothing forcing religious organisations to carry out marriages that they do not want to. It clearly does not in any way impinge on a freedom of religious people to practice their religion.

Senator HANSON-YOUNG: Do you have any practical examples for us about how acknowledging the legal status of an overseas marriage—a practical implication of what that means to the couple involved? At the moment a gay couple can go to New Zealand and get married; they arrive back in Sydney at the international airport and effectively their marriage is null and void. Are there any legal practical examples you can give the committee to help us understand why this is important, beyond the symbolic nature?

Mr Gardiner: I just have to endorse Tony Briffa's remarks in the previous session: mere symbolism is in fact extraordinarily important. There is a sense in which there is no answer to your question because if you are married in one country and you have the various rights in that country, and then you suddenly become 'unmarried'—it is very hard to work out how that all works. Australia does have now, in this state and federally and in most states, quite substantial practical legal rights for couples regardless of sex. But, as Tony pointed out, this is the classic, 'You can sit at the back of the bus.' An artificial distinction is made, a discriminatory and soul-sapping distinction, which says 'second class', 'inferior'.

There are probably some specific legal differences, generally speaking, and on this one I think I may have read more deeply than Tony because I have been involved in it, whereas he has—she—sorry, I keep forgetting: I am one of those friends who can never remember which pronoun to use with Tony. The issue of when does a marriage have significantly different rights from a couple, a de facto marriage, which is, to a large extent, recognised in Victoria—let us stick to Victoria for us. A couple such as Tony and Manja would be recognised as domestic partners under the Relationships Act of Victoria and, having been together for more than two years, that would apply to all purposes. In fact, I am very sad to hear the story of Tony's former partner Zina and her wife, who were not recognised. If that was in Victoria and that was three years ago—or even if it was 13 years ago for that matter—the staff of that facility that failed to recognise their relationship were acting unlawfully. Victorian law does not permit, does not regard that sort of discrimination as lawful—but that is another matter.

There are a couple of specific things. In Victoria we have the general recognition of domestic partnership. We also have registered partnership. If a couple like I and my partner register, then that takes place for all purposes immediately from the moment of registration, just as a marriage does, and that has effects on the Family Law Act. For example, while I think there is a two-year waiting period before a domestic partner would be recognised as the federal term of 'de facto partner', there is immediate recognition under federal law, under the Family Law Act, for a registered partner—exactly the same as with marriage. That is one of the few places where there is a specific difference between a relationship that is recognised by state law as a couple relationship and a marriage. That, of course, would apply to—for example, my grandfather and my grandmother met when working in a hospital—doctor and nurse; classic thing—in 1910 and they married eight weeks later. They would, under current law, be recognised as a couple immediately, whereas if they were—I am going to have too many ifs. The point is that for a same-sex couple or for a non-man-and-woman couple, for some things it is two years, for some things it is

immediate on the doing it. If a couple have been together for two years before they decide to get married, it makes no difference.

So there are a very small number of very specific things. We will probably find more when we start looking for them. But this issue is very much about dignity, equality and freedom. And, as we have said in the law institute's submission, this is about international comity. There are 19 countries which allow marriage equality. I have studied these, although I have not looked at the most recent cases. I wrote the chapter in the book when the number was 11 or 13, depending slightly on how you counted it. All of the countries that I studied—and I am pretty sure this applies to the others—deal with it in a way that would have accommodated Tony and Manja. They simply deal with equality or remove any reference to 'male' and 'female'. Indeed, you have already indicated that if your bill proceeds it will be amended.

Also—and Senator Macdonald asked a question about this—there are five countries, which we mentioned in our submission, which do not allow same-sex marriage but do recognise foreign marriages. They are Israel, Japan, Italy, Malta and the Netherlands Antilles. They do for same-sex marriage what your bill will do for marriage equality. They do not allow it, just like we do not allow it. But they recognise it, as we should.

Senator CAROL BROWN: We have had a bit of a discussion here this morning in particular that this bill will create a new legal claim on the basis of discrimination. We had a discussion about whether religious ministers would be required to solemnise a marriage between a man and a man or a woman and a woman. We had evidence that that is already taken care of in the Marriage Act.

CHAIR: Was that in the Marriage Act or the discrimination act?

Senator CAROL BROWN: It is in the Marriage Act.

Mr Gardiner: The Marriage Act expressly provides and has done since 1961 that a minister of a religion has complete freedom to decide whether or not to marry people.

Senator CAROL BROWN: It is section 47.

Mr Gardiner: I forget the exact words but it generally says that a religious celebrant is not required to marry people.

CHAIR: I am sorry to keep interrupting you, Senator Brown, but didn't we go through that before and we were told that it was not in the Marriage Act, that it was in the discrimination act?

Senator CAROL BROWN: It is in the Marriage Act.

CHAIR: I thought we were told that it was not.

Senator CAROL BROWN: We thought that there were sections in the discrimination act relating to other events. It is my understanding that it is section 47 of the Marriage Act.

Mr Gardiner: I have a couple of suggestions. First of all, the current bill has nothing to do with anything that ministers of religion can do or can refuse to do in Australia because the marriages we are talking about are occurring in the Netherlands, Belgium, Canada, the United Kingdom, New Zealand—

Senator CAROL BROWN: My question is—

Mr Gardiner: Is there a discrimination issue?

Senator CAROL BROWN: The discussion we had on this earlier was that—and, forgive me, because I do not know if they were talking about overseas or not—taxi drivers, florists and party planners were getting sued—

CHAIR: They gave the example of an accommodation house here, and the case is under appeal to the High Court.

Senator CAROL BROWN: because they did not want to be involved in a same-sex marriage ceremony. So my question to you is: does this bill create any new legal avenues that do not already exist?

Mr Gardiner: I am certain that it does not.

Senator CAROL BROWN: That was what I was trying to get to.

Mr Gardiner: I might also comment that it is a pity that some people think we are a province of the United States, which is where most of those examples come from. They do the rounds of the internet like memes but, in fact, they do not apply under our law.

CHAIR: It is not unique in that regard!

Senator CAROL BROWN: A number of other submissions have also claimed that they see the recognition of foreign same-sex marriages as the first step towards same-sex marriage in Australia and that the recognition of

foreign same-sex marriages would be a contravention of Australia's obligation under the Convention on the Rights of the Child. Do you want to give me your view on that?

Mr Gardiner: I would be delighted to. I think the answer is that the Convention on the Rights of the Child requires two things. One is that the best interests of the children be of paramount consideration. Another important thing is that children should not be discriminated against on the basis of the status of their parents. There is also an overriding subtext within the Convention on the Rights of the Child that children's rights, dignity and health should be respected. The conclusion from that is that by refusing to recognise these marriages—in particular, if a married couple, say, two women, with children emigrated to Australia from a country where they got married—then children would be discriminated against in contravention of the Convention on the Rights of the Child by being treated in a lesser way because their parents are treated in a lesser way and a discriminatory way. So I think the answer is quite the opposite. I think the Convention on the rights of the child is in favour of recognising the marriages that have been conducted lawfully in other countries and, indeed, it would also recommend equality fully in Australia.

The parliament is not bound by its earlier decisions. Just because the parliament votes in favour of Senator Hanson-Young's bill does not have any consequences for a future parliament voting on some different bill. I think those who have made that sort of assertion misunderstand the duties and responsibilities of senators and members of the House of Representatives.

Senator CAROL BROWN: Are there any other comments?

Mr Kennedy: The best interests of the child is obviously paramount in that treaty. It is, to a certain extent, a separate issue to recognising foreign same-sex marriages. If those couples already have children and are bringing them up in a loving manner then I do not see how it breaches any obligations under that treaty.

Senator CAROL BROWN: In the Australian Lawyers for Human Right submission in paragraph 4.8 you talk about public opinion and that the view of Australians is that there is a substantive majority in favour of same-sex marriage. Can you talk to the committee about where that evidence is from?

Mr Kennedy: There have been a number of polls over the years in relation to this issue. The most recent poll seems to show that about three-quarters of the population supports same-sex marriage. Obviously the only way that we can gauge this type of public opinion is through polling, and the polls have shown over the years an increase in support for it. When you are looking at public policy, you have to take into account the views of people and you have to take in account the views of the other major party, the Labor Party, and the Greens, a substantial party in Australia, who both have policy platforms in support of same-sex marriage. I think section 88EA does breach our obligations under the Hague Convention, and I do not think it would be incompatible with public policy to recognise foreign same-sex marriages.

Mr Gardiner: The notion of being incompatible with public policy is clearly contradicted by, among many things, by the consistent growth in public opinion in favour of marriage equality—and that is generally, not just for overseas marriages, and I bet the figures would be higher. Someone else's submission was sitting on the table and I note that it reminds us that the Crosby Textor poll just a few days ago found 72 per cent—very nearly three-quarters, as Mr Kennedy said—were supportive of marriage equality and said that the majority response in each state said that they wanted to see marriage equality, as did a majority of Australians who identified with each of the major religions, including Catholic, Anglican and non-Christian religions. This is in submission No. 20 from NACLC. That is in terms of saying, 'Well, Senators, if the committee recommends the passage of this bill with the discussed amendments and if the Senate accepts that recommendation, you know you have public opinion behind you.' That is not always the case. It is something that should give you some warmth and succour.

CHAIR: Mr Gardiner, as I have been saying in relation to that poll and every other poll, we are politicians and we know polls and there are polls and there are polls. It depends who commissions them and the questions that are asked. I know Crosby Textor are a very reliable and honourable group, but we only take notice of polls when they say that our political party is ahead in the polls. Other than that, we ignore them.

Mr Gardiner: This has been noted.

CHAIR: I may have misunderstood you, Mr Gardiner: did you say that Australia should recognise foreign marriages that would not occur in Australia? I think you mentioned polygamist marriages. Are you saying that Australia does or should—

Mr Gardiner: Australia does and has for years—because that is the private international law position that section 88EA and section 88B4 overrode in 2004. In 2004 the Marriage Act was amended to exclude non-heterosexual marriages from the general principles. That was done because there were two couples who initially did not know each other—one of two men and one of two women—who had been married in countries which

were relevant to them. One or other partner was Canadian and Dutch in this case, if I remember rightly. They had gone to the Family Court just to get a declaration that, under the usual rules, their marriage was recognised. The Marriage Act was amended on 13 August 2004 to cut their law suits off at the knees and to say no. But the ordinary law does recognise polygamist marriages where they are conducted within the law of the place where they were married—in Saudi Arabia, for example.

CHAIR: So, if a Saudi Arabian comes here with two wives, you are saying that Australia recognises that?

Mr Gardiner: Yes. Absolutely They can both get a widows pension.

Senator CAROL BROWN: If that has happened already in Saudi Arabia.

Mr Gardiner: Yes. They cannot get married here. People from a foreign country, whose marriage could not have been celebrated here but was lawfully celebrated in the country they came from, if they were not subject to one of the disabilities that are generally recognised, such as being forced or under age—so if they are ordinary marriages but they happen to be not possible under our law, in particular polygamist marriages like your Saudi Arabian man with two wives—could come here 10 or 20 years ago and their marriage would be recognised.

CHAIR: I misunderstood evidence that was given earlier—from two QCs I might add. Perhaps I mistook what they said. I understood them to indicate that that was not the case. We might clarify that.

Mr Gardiner: Section 6 of the Family Law Act—

CHAIR: For the purposes of the Family Law? For the purpose of dealing with property and children, I would assume.

Mr Gardiner: Yes. But that is was one of those things that was put in to avoid—

CHAIR: But we would not recognise the assumed Saudi man who is in Australia with two wives. We do not recognise that here.

Mr Gardiner: Yes, we do.

CHAIR: We will try to clarify that. There is another issue which, again, I readily admit that I perhaps got wrong. There was a case quoted to us of Hamalainen v Finland—a case in the Grand Chamber of the European Court of Human Rights. As I understood what was told to us this case said that refusal of same-sex marriages is not a breach of the Convention on the Protection of Human Rights and Fundamental Freedoms. Perhaps Mr Kennedy or someone at the table might like to comment on that. Are you aware of the case? Have you heard of it. I think it was fairly recent.

Ms Bradin: I am not aware of it.

Mr Gardiner: I have not read that one. Even though I have not read the case, referring to the grand chamber tells me that this was a case under the European convention of human rights, which obviously we are not party to—and it is merely one of the sources of human rights law.

CHAIR: As I recall it, it was suggested that this was similar to the international convention.

Mr Gardiner: There are some significant differences but also significant similarities. Human rights are more or less the same except for tiny details. The institute is of the opinion that now, if the right case were brought to the Human Rights Committee of the United Nations under the convention to which we are a party—the International Covenant for Civil and Political Rights—the view would be taken that the denial of marriage equality is a breach of the convention. But it is true that the only communication that has been taken to the Human Rights Committee on this matter is Joslin et al v New Zealand, nearly 15 years ago. That case was heard, I believe, before the communication of Young v Australia, in which a veteran, Mr Young, communicated with the Human Rights Committee who agreed that the failure of Australian Veterans' proceedings to recognise his late partner as his partner was a violation of the treaty. For a variety of reasons building on that and from the fact that, since that case was heard, 19 countries have recognised marriage equality, we believe it is highly likely that the next time it goes to the Human Rights Committee they will find, as we are asserting, that the failure to have marriage equality is a breach of human rights. That is the general position. Obviously, we are only talking here about the recognition of marriages where they are already legal.

CHAIR: I will quote paragraph 96 of that assessment. It says:

The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman—

and they quote *Rees v. the United Kingdom*—

While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.

Mr Gardiner: That makes perfect sense in the context of that treaty and its development.

CHAIR: Could you look at the evidence given by the Lawyers for the Preservation of the Definition of Marriage—Professor Rochow SC and Mr Christopher Brohier. You might like to look at their evidence when it comes out and perhaps alert the committee to your views on what they said. Mind you, I will ask the secretary to alert them to what you have said and let them make comment on that. I am particularly interested in the bit about polygamist marriage. Again, I am not doubting you for a moment, but I am quite certain that I was told differently by someone. Anyhow, we will see.

Mr Gardiner: Perhaps Ms Dunstan can communicate with us on the details so that we get the piece that you are referring to. I would be happy to make some comment.

Mr Kennedy: I have a computer in front of me and I looked up article 12 of the European Convention on Human Rights. It has different wording to the universal declaration. It says:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

I would say that in that judgement they are obviously deferring to the national laws of the particular country in question. That probably gives it a bit of a different flavour.

CHAIR: I think they are relating that to the Australian situation.

Mr Gardiner: But it would be wrong to do so. If Mr Kennedy has the treaty open, one of the issues with the European convention is the equality provision in article 8, if I remember rightly. It is also differently worded from the more emphatic equality provision of the ICCPR. That is another issue.

CHAIR: The suggestion that was made to us is that there is no more human right than the European human right.

Mr Gardiner: QCs are well known for referring to the things that advance their arguments and leaving out the others.

CHAIR: That probably applies to lawyers across the board, not only QCs.

Mr Gardiner: Yes. Could I perhaps just mention briefly on this point the recent decision of the High Court which emphatically but very economically went through this sort of argument that those people to whom you refer made about the understanding of marriage in the 19th century. They made very pointedly the remark that marriage has changed and is changing. They concluded, relevantly for their decision, that marriage equality was clearly within the powers of the Commonwealth parliament, which had been doubted by people like the submitters that you referred to. They comprehensively trounced that particular argument about the traditional understanding.

CHAIR: I am not sure that the submitters said that. I am not sure I verballed them in that way either, but I do not doubt that the Commonwealth has the power to deal with these things. We do it all the time. But we are grossly over time. Is there anything further that either of you wanted to leave us with?

Mr Kennedy: I think our position is fairly clearly set out in our submission.

CHAIR: Thanks. I appreciate that.

Mr Gardiner: My colleague has just reminded me that in our submission we made a brief reference to state laws that might need to be looked at.

CHAIR: Should this bill be passed, you mean?

Mr Gardiner: Should this bill be passed. That was merely to explain that where a state law requires someone to be not married when they enter into a registered relationship, if they are in fact married but in New Zealand or Canada, there may well need to be some finessing of that either in state law or in the Commonwealth law. But that was merely to cover every possibility, as lawyers do. I just wanted to explain it.

CHAIR: Thank you very much for your time and for your submission. I appreciate your attendance.

BENSON, Reverend Rod, Public Issues Consultant, Australian Baptist Ministries

COMBRIDGE, Reverend Daniel, Presbyterian Church of Australia

JOBBERNS, Reverend Keith, National Ministries Director, Australian Baptist Ministries

JOSEPH, Miss Mary, Research and Project Officer, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney

MENEY, Mr Christopher, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney

MIDDLETON, Reverend Darren, Convener, Church and Nation Committee, Presbyterian Church of Australia

SHELTON, Mr Lyle, Managing Director, Australian Christian Lobby

[14:44]

CHAIR: Welcome, Miss Joseph, and gentlemen. Thank you very much for coming along. I apologise for keeping you later than the appointed time of 2.15. Because we are running a bit late, unfortunately, Senator Hanson-Young has to leave around three o'clock to catch a plane. I should indicate an apology from Senator Collins, who was with us but whose husband is not well and she has had to be there rather than here.

Having said all that, I do not think you were here when I gave these long advices of what this hearing is all about. As you are aware, it is an inquiry by the Senate Legal and Constitutional Affairs Legislation Committee into the Recognition of Foreign Marriages Bill. It is deemed to be a proceeding of parliament, so parliamentary privilege applies. If, for any reason, there is anything that you want to deal with in camera, you can ask about that at the relevant time and we can perhaps do that if it is required.

When you are first speaking—and there are a large number of us here—would you just make sure for Hansard that you indicate who you are, particularly the first time, and perhaps it would be useful at other times as well, just recognising that, to get it right, Hansard needs to know who is saying what at the right time. When you speak for the first time you might indicate who you are and in what capacity you are here.

We have your written submissions, which are, respectively submission Nos 9, 7, 23 and 8. First of all I would like to ask if anyone wants to correct or amend any of the written submissions. If not, I invite all or any of you to give an opening statement—hopefully, relatively briefly, so there is some time for us to ask questions.

Mr Meney: I would like to thank the committee for the opportunity to contribute to the inquiry and to acknowledge, of course, there are people of goodwill on both sides in relation to the issue of marriage. But we believe that this particular bill would make for very bad law. We challenge the Recognition of Foreign Marriages Bill 2014 on the following grounds. The meaning of 'marriage' continues to endure as the union of a man and a woman entered into for life and open to the possibility of children. The reason the state has recognised marriage and distinguishes it from other types of relationships is because of this unique capacity to generate children and to meet children's deepest need for love, attachment and nurturing by both their father and mother. The bill directly conflicts with section 51 of the Marriage Act. The vast majority of the world's nations share our understanding of 'marriage' as that of the union of a man and a woman entered into for life and open to the possibility of children. It is not unjust discrimination to uphold the law on marriage. The bill is an attempt to circumvent the democratic process. The bill opens up the very real possibility of future demands for the recognition of a variety of alternative unions as marriages in the future. The bill is incompatible with human rights law regarding marriage. The bill fails to serve the common good in the interests of children. We believe that it is an unacceptable undermining of the Marriage Act and the meaning of marriage for the community. We believe the bill reflects a failure to appreciate the social dimension of marriage and to understand why the law must reflect and apply a single definition of 'marriage', given the enormity of the importance of marriage to children, culture and the society. For these reasons, which are expounded upon in our submission to the committee, we believe the committee has a responsibility to reject the Recognition of Foreign Marriages Bill 2014. Thank you.

CHAIR: Miss Joseph, do you wish to make an opening statement?

Miss Joseph: No, I am fine, thank you.

CHAIR: Reverend Benson?

Rev. Benson: Yes. In one sense, this is not a very significant bill, but because it relates to marriage, which is of significance to the church and to the wider community for various reasons, we do regard it as relevant to have made a submission, and it is a submission No. 8. We make a number of points, mostly that, in our view, the bill seems to be a smokescreen for same-sex marriage by stealth. If this bill is passed then it suggests to me at least

that if another bill was to come to the Australian parliament for same-sex marriage in Australian states and territories then it would be easier for that case to be made.

CHAIR: There is no need to elaborate on that, because both the proposer of the bill and certain people speaking spoke of it, clearly acknowledge—

Senator HANSON-YOUNG: It is not a smokescreen; it is way over there!

CHAIR: Yes, it is there, so we accept that argument. It is one that everybody accepts, so there is no need to elaborate on that.

Rev. Benson: I would endorse what has been said by Mr Meney in this session on the common understanding of marriage—marriage being a benefit for the common good not simply for particular groups in Australian society. I draw attention to the fourth paragraph on page 3 of our submission.

The conventions of marriage are deeply embedded in human history and culture. Those who oppose same sex marriage do so because they respect the wisdom of hundreds of generations of human tradition, and care about the common good of future generations. As Sydney University Law Professor Patrick Parkinson has pointed out, 'The question really is whether we value marriage enough to preserve its cultural meaning and distinctiveness.'

It seems to me and to those representing Australian Baptist Ministries that this bill and other bills of a similar nature seek to undermine either intentionally or otherwise the understood cultural meaning and distinctiveness of the institution of marriage, which is not a Christian or a religious institution but a social institution backed up by hundreds of generations of tradition—something very important for the common good of this generation and of future generations.

CHAIR: Reverend Jobberns?

Rev. Jobberns: No, my colleague has spoken there.

Rev. Middleton: Firstly, I would like to thank senators for the opportunity to address you. I will try to be brief and make a summation of our submission. In view of the Presbyterian Church of Australia, the current bill does not serve the best interests of children but is oriented towards the best interests of some adults. In revising marriage, we are revising and re-weighting the rights of adults and children, and in fact inversing historical and legal hierarchy, that traditionally has said that the best interests of the child should be paramount. We consider that to be the primary consideration with this bill and all related bills to do with marriage. That is our major concern.

We stated in our submission that the bill undermines the UN Convention on the Rights of the Child and that the best interests of the child should be the primary consideration. Moreover, article 7 states, 'As far as possible, children should have the right to know and be cared for by his or her parents. Article 9, 'The child shall not be separated from his or her parents against their will, except where that occurs through relevant authorities ameliorated by the primary consideration of the best interests of the child.'

I realise this bill recognises foreign marriages, but this is a trajectory we are on and it is appropriate to have a wider debate. Homosexual marriages by design will separate a child from one or both of the natural parents. That is an inevitable outcome. When there are rights there are always corresponding duties. If the states enlarge the lines around what is a relationship they recognise as marriage, with that right will come corresponding duties which will have implications for children. We noted in our submission that both state and federal governments in recent years have apologised for forced adoptions, the stolen generation. We believe it could easily be an unintended outcome of a movement away from traditional marriage. Not to mention that we think that both there is this complementary nature of a male and a female, particularly a mother and a father, that should not be easily discarded for the rearing of children.

In addition to that, we have concerns about the effects on children. This bill presupposes a definition of marriage that is obviously incompatible with our current laws. It seems to us that it would make more sense if we addressed the first issue—what is marriage?—and then this would naturally be a corollary that would follow. It seems to me, just by way of process and logic, that this is back to front. Define marriage first, or redefine marriage; then this would naturally follow. But this way we will have this inconsistency and incongruity. You will have some people in our society who have recognition—for example, homosexual couples or polygamous partners—but other Australians who will not. There will be an obvious inequality.

While the talk around this has been about equality—and I do not quite accept that—even if that were true, this creates other inequalities because, as soon as you pass that, you are going to have a bunch of people in Australia who might want to have polygamous marriages that will not be allowed to be married. You will have people who perhaps are of homosexual orientation who would like to be married but will not be able to be married. So I am not quite sure that it does address its stated issue of equality. Moreover, I think the current definition of marriage,

which is a union of a man and a woman to the exclusion of all others, voluntarily entered into for life, is very close to the biblical definition. I realise that may not be its intention, but I think history would say that has been the controlling factor. Jesus said in Matthew 19:

> … a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh. So they are no longer two, but one flesh. What therefore god has joined together, let no man separate.

I will close with this idea. But both Christ and the state have drawn lines around what sort of relationship is a marriage—we have already defined that—and what sort of relationships are not a marriage. I think what we have done by recognising that you require a male and a female is because, in that bodily union becoming one flesh, it is naturally correlated to the production of children. That is the primary interest of the state. The primary interest of the state in marriage is that it is concerned for the next generation of Australians. The state is concerned with that because it believes that it has the duty to children to protect them and to provide them with the best environment. That is not to say that people in other environments do not love their children or do not even have good outcomes. It is simply saying: what is the best environment? We believe the best environment is a union of a man and a woman to the exclusion of all others, voluntarily entered into for life. Thank you.

CHAIR: Thanks very much, Reverend Middleton. Reverend Combridge?

Rev. Combridge: I have nothing further to add.

CHAIR: Mr Shelton?

Mr Shelton: Thank you, Chair, and thank you, senators, for the opportunity. Now that it is all out in the open, I guess, the Recognition of Foreign Same-Sex Marriages Bill is an attempt to further pressure parliamentarians into supporting the same-sex political agenda to change the definition of marriage. There is no discrimination in Australian law against same-sex couples, and that is as it should be. But for some reason it is important to some political campaigners to see marriage change from what it is to something else, and in doing so they dismiss concerns about the many consequences that flow from such a change in the legal definition of marriage.

This issue continues to be privileged, with extraordinary amounts of parliamentary time and public resources devoted to it. A bill to recognise foreign same-sex marriages was defeated in the Senate just last year. There have been at least 11 attempts at state or territory level to legislate a new definition of marriage. All have failed. A House of Representatives committee in 2012 declined to support same-sex marriage. There have been three Senate inquiries since 2010. There have been numerous state parliamentary inquiries in the past two years, all followed by votes opposing changing the definition of marriage. The exception was the ACT Legislative Assembly, where nine people voted to set a precedent for the nation, which was obviously later overturned by the High Court as unconstitutional. ACL, in approaching this inquiry, facilitated 42,000 signatures on a submission to this inquiry. There is plenty of grassroots concern about moves to change the definition of marriage.

Such is the politically correct orthodoxy surrounding this issue, few people are willing to stand publicly against the political agenda it represents. No-one wants to be accused of prejudice, but this unfortunately is what Australian Marriage Equality asserts is the basis of opposing their political objectives—I would point you to page eight of their supplementary submission. This of course is deeply offensive to Muslims, to Christians, to Jews and to countless other Australians of no religion or nominal religion, who will always believe the truth about marriage and will want to teach it to their children.

We do not have fear or hate in our hearts. We simply have a view about marriage that we wish to see upheld in public policy. We want to uphold this through the institutions of civil society, such as schools, charities and churches—institutions that we create and participate in.

The recent Crosby Textor poll, which has been commented on at length today, misleads people, if I can say so respectfully, by framing the questions as if no-one but the same-sex couple would be affected, and that there would be no impact on religious freedom. On page 11 of our submission we refer to the wording of the Crosby Textor poll.

Our submission also references the florist in Washington state, the photographer in New Mexico and the baker in Colorado, who have all faced or are currently facing serious legal sanctions because of their conscientious objection into participating in same-sex weddings—and there are many more.

When the ACT was legislating last year, the Attorney-General, Simon Corbell, wrote to me to confirm that this was not just an 'only in America' scenario, but that business people who exercised their conscience in declining to participate in a same-sex wedding would be in breach of the ACT anti-discrimination act. I am happy to provide the committee with a copy of this letter. I have marked the relevant point on the second page. It is also quoted in our submission, for those who might have read our submission. Australians do not want to see their fellow

citizens being fined or perhaps even jailed for acting on their belief that marriage should be between a man and a woman.

A child such as baby Rhyley, lying in a Thai hospital ward, featured on page three of yesterday's *The Age*, is also affected by same-sex marriage ideology. He is denied both his surrogate mother and his biological mother because the rights of two men to acquire a baby are allowed to trump the International Covenant on the Rights of the Child, which says that all children have the right to be raised, wherever possible, by their biological parents. Sure, James and Steve are capable of showing Rhyley love, and I am sure they will. But neither can be his mum.

Marriage is not just about the emotional needs of adults. The definition of marriage references a biological reality that helps protect the rights of children. That is why governments regulate marriage. Governments have no interest in other forms of romantic relationships. They are simply none of our business. Rhyley is denied his human right to a mother not because of tragedy or desertion but because of a deliberate social engineering decision taken by two men. We have to ask ourselves whether this is ethical. We have to ask ourselves if we want a new definition of marriage to set these practices in cultural cement. The law is of course a teacher.

Our submission references other polling showing that 73 per cent of Australians believe a child should be raised, wherever possible, by a mum and a dad. We can not have it both ways. There is cognitive dissonance in the debate in this country at the moment. I think we desperately need a mature debate about this. On the one hand people say yes to same-sex marriage and on the other hand they say a kid should have a mum and a dad, yet this is hardly even discussed in the debate we have had over the last few years. If we think removing children from their biological parents is fine, then go for same-sex marriage.

'Marriage equality' is a slogan whose meaning should be unpacked. If equality is the principle, how can we deny other definitions of marriage already recognised legally by other foreign jurisdictions? What makes the gay lobby's definition morally superior to those defined legally in other jurisdictions and cultures? One of the many overseas examples of the legal harassment of dissenters to same-sex marriage is the story of Washington florist Baronelle Stutzman, who is being sued by the state attorney-general. She has been referenced today. I table her story in a seven minute electronic video presentation. With your permission, Chair, I would like to distribute these to the committee members. I challenge anyone to watch her story and continue to uphold the idea that legislating a new definition of marriage has no consequences for freedom. Clearly it does. I challenge anyone who thinks there are no consequences to changing the definition of marriage to look a child in the eye and tell her she is not allowed to be raised by her biological mother or father.

Finally, there has been reference to the Hague convention today and also reference to slippery slopes and the like. When the convention was being debated in the Australian Senate, the slippery slope argument was raised. The then foreign affairs minister, Gareth Evans, made it very clear that this was not a pathway towards recognising homosexual marriage. That was even being speculated about in the press as far back as 1985. I am very happy to table also Senator Evans' words. Thank you very much Chair and thank you, Senators.

CHAIR: I acknowledge that Senator Hanson-Young has to go to catch a plane but wanted to stay until the end of all the speeches.

Senator HANSON-YOUNG: Thank you. Obviously I am the proposer of this bill so you know where I stand. The most important thing in this debate, and I have seen many of you across this table on various occasions, is I think the level of debate is becoming more respectful. That is what I wanted to raise with you because I have been doing this for a long time and I think we are becoming more concise on both sides about what it is that we care about and what it is that the law should and should not cover. I wanted to thank you for participating in a good-natured way.

Unidentified speaker: That is very good of you.

CHAIR: A couple of you have mentioned the UN Convention on the Rights of the Child. I am not sure how many of you were here to hear the previous evidence. Can you reiterate or repeat in which way you say this proposal—

Mr Shelton: The proposition of same-sex marriage, in my view, breaches the rights of the child, which says that a child has the right wherever possible to be raised by their mother and father. That is not the exact wording. I believe it is in our submission. Reverend Middleton quoted it exactly. Unfortunately , the previous witnesses were quoting a little bit selectively . They did not mention clause, but it is a key clause.

CHAIR: A child of a divorced couple does not have the right to be with their biological mother and father. Could you not equate that to this?

Mr Shelton: Not at all because this is a statement of aspiration that, all things being equal, wherever possible a child—obviously not in an abusive situation and the like. Of course, that is accepted. As a basic human right, a child has the right to at least start life and wherever possible be raised by a mother and a father.

Senator CAROL BROWN: I will have a look at her story but can you tell me—I do not know her story in full—is her objection a religious objection?

Mr Shelton: Yes, it is. It is a matter of conscience. You will see on the seven-minute clip that the homosexual couple were clients of her florist business from many years. She was friends with one of them. She provided flowers to them.

Senator CAROL BROWN: She provided services to them for other events?

Mr Shelton: Yes, for anniversaries, birthdays and the like, but when it came to the wedding she felt that was a line she had to draw, that she could not participate in same-sex marriage. For reasons of conscience, she declined to provide that service and then was quite shocked when the state Attorney-General stepped in and instigated the first action against her. That has been since followed by the American Civil Liberties Union and then the couple themselves, as I understand it.

Senator CAROL BROWN: In Australia, if someone did not want to provide a service outside marriage ceremonies, there is already legislation about discrimination.

Mr Shelton: That is right and that is the significance of the letter from Simon Corbell—

Senator CAROL BROWN: I read that.

Mr Shelton: And also the previous witnesses, the lawyers Rockow and Brohier, were making the point that this flows through antidiscrimination legislation, and Simon Corbell bears that out. So there is a big threat to freedom of belief and freedom of conscience that flows as a result of a change in the legal definition of marriage. And I must say that this is of major concern to the Christian constituency in this nation. People are well aware of this, and becoming even more aware, as we see members of the same-sex lobby continually chipping away at the protections for religious freedom that exist in antidiscrimination law—Christian schools being able to hire staff who share their ethos, aged-care providers being able to keep that sort of ethos in their Christian aged-care homes et cetera.

CHAIR: There was a case mentioned by some of the lawyers, which was about accommodation at a youth camp, which is currently before the High Court.

Mr Shelton: I think they are seeking leave to go before the High Court. It is not quite there yet.

CHAIR: I guess you would be very concerned if any of your establishments were required to deal with an issue you had a strong philosophical and religious objection to.

Mr Shelton: Yes, I think that is a major concern. This is happening now, even in the absence of same-sex marriage legislation. I think it would be quite reasonable to assume that, should the legal definition of marriage be changed, that would have effects even more far reaching than what we are seeing now.

CHAIR: You spoke about a poll. There are polls and there are polls. As politicians, we are very well aware of them—and it depends on the questions, who is asking them and who commissioned the poll. The only poll we ever take any notice of is the one that says we are ahead in the electoral race.

Mr Shelton: That poll has been widely ventilated and it has had a lot of media coverage. The wording is quoted in our submission, but I will paraphrase it. It says: 'Given that same-sex marriage affects no-one other than the couple, do you support it?' I would support it on that basis. But I think we have demonstrated that this is not just about a couple; this has massive societal consequences for freedom of speech, freedom of religion and the rights of the child.

CHAIR: I think those points have been made but, as I say, polls are polls.

Rev. Middleton: Chair, you asked a question earlier about the United Nations articles. Article 9 says:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

So, even where separation may occur, the controlling issue is: what is the best interest of a child? And I guess that has been much of the concern of our own submissions.

Senator CAROL BROWN: Are you aware of the literature review prepared for the Australian Psychological Society in 2007? It has been referenced in one of the submissions—I cannot tell you which one. It found that the research indicates that 'the parenting practices and children's outcomes in families parented by lesbian and gay

parents are likely to be at least as favourable as those in families of heterosexual parents despite the reality that significant legal discrimination and inequity remain significant challenges for these families'. How would you respond to research such as this which shows that children in the care of two parents of the same sex have at least the same health and welfare outcomes as children raised by parents of opposite sex?

Miss Joseph: I am aware of that review. A number of problems with the literature on children raised by same-sex couples have been identified by a number of researchers. The Regnerus study, which we cite in our submission, looked at a quite a lot of data on this, under the new family structures study, with a large number of families in the US. Professor Regnerus found that there were definitely significant differences between children raised by same-sex couples and those raised by their biological mother and father. He cites a number of other reports which detail this quite strongly, such as Professor Patrick Parkinson's 2011 report 'For kids' sake'.

Senator CAROL BROWN: We spoke about that this morning.

Miss Joseph: Yes, that is a very good study. More generally, there are significant problems with the literature on children raised by same-sex couples. One problem is that they lack longitudinal research—

Senator CAROL BROWN: Are you now talking about the review that was prepared for the Australian Psychological Society?

Miss Joseph: That is right—the study cited by the APA review. They have significant limitations, such as that they have not studied the children over a long enough period of time to be able to draw really solid conclusions. They also often suffer from a lack of randomisation. Because the number of children is relatively small it is very difficult to randomise. So they rely on self-selection; they recruit families into the study, and parents opt into the study. They are recruited in various ways. It is not controlled, so that does mean that the validity of those findings has to be questioned somewhat. And that has been noted by a number of prominent researchers, such as Professor Judith Stacey, who is very pro same-sex parenting. She herself acknowledges in her work that there are no randomised controlled studies of the children raised by same-sex parents, that research is not available.

We do know further from research that was done on adult children of divorce that the long-term effects of growing up without a relationship with your biological mother or father can sometimes only be fully manifested in adulthood, especially when those children reach the age of forming relationships and starting to have children of their own. The fullness and enormity of that loss becomes clear at that point.

Senator CAROL BROWN: Surely children from divorced parents are different from the children of same-sex couples, Coming from a family that has, unfortunately, split, there are all sorts of reasons why children may carry those issues.

Miss Joseph: Where they are similar is that the child experiences a loss of that day-to-day relationship with the biological parent. The implications of that loss, the research suggests, are often only fully seen as the child reaches adulthood. That is why it is important, when we look at this literature, to keep in mind that the long-term data is not there yet.

Senator CAROL BROWN: I have not read this research, so I would be interested to have a look at it. It was put to the committee that, in Professor Parkinson's work, the best outcomes were for children in stable, caring relationships regardless of whether they are man and woman or same-sex couples.

Miss Joseph: I think it is always better for children to have stability. We certainly do not say that it is not possible for children to receive love and nurturing in those relationships and those family structures. But the evidence, looked at as a whole, very strongly suggests that having that relationship with a biological mother and father and being able to be nurtured by those two people in your own home is very strongly associated with positive outcomes for children, and where children do not get to have that relationship with one or the other of those parents, that is a significant loss to that child. Unfortunately, there are many situations in life where that happens; families break down, and that is very sad. But when we are looking at changing the definition of marriage we need to be concerned that we do not deliberately create a situation where children brought into this world are being denied that chance from the very beginning.

Senator CAROL BROWN: But even where the children have a mother and father they are not always married. You are not separating them from married couples?

Miss Joseph: No. Of course it is always good for a child to be with their biological mother and father, but we would say marriage strengthens the relationship and bonds the couple together in a way that—

Senator CAROL BROWN: That is probably why same-sex couples are so determined to advocate for themselves.

CHAIR: I think Miss Joseph meant marriage in the traditional sense.

Miss Joseph: I can understand that desire, but we would say that marriage between a man and a woman exists for the common good, for the good of children, because that relationship naturally tends to produce children.

Senator CAROL BROWN: I understand your position. But are you saying that, because there is not enough evidence and research into children reared by same-sex couples, the jury is out on that?

Miss Joseph: If you look at the social science standards, the generally accepted standards for this kind of research, it is acknowledged even by those who are very affirming of same-sex parenting that the current research does not meet that level of randomised controlled trials that would be required to produce really good evidence in favour of children being raised in that family structure.

Senator CAROL BROWN: Nor is there evidence to say that they are not.

Miss Joseph: I would argue that there is evidence that children do suffer from the loss of a relationship with a biological mother or father; and, unfortunately, being raised within a same-sex family structure does involve that loss.

Senator CAROL BROWN: Thank you, Miss Joseph; I appreciate your evidence.

Rev. Middleton: I think as a society we have acknowledged that the biological parents do matter. Victims of the stolen generation were, in the main, placed in loving homes. It was not the love that was the egregious error; it was the removal from the biological setting—and it is the same with the victims of forced adoptions.

CHAIR: I am aware of a situation where a child has a relationship with both the biological mother and father and in fact lives with the biological mother but regularly visits the biological father and his male partner. Does that still maintain the relationship between the biological mother and father?

Mr Meney: Different circumstances evolve in different family relationships; there is no doubt about that. But what we are talking about is: what are we trying to do in terms of the societal norm around marriage? We know that marriages break down. We know that there is infidelity. We know that there is a lot of messiness in human lives. But we still believe that there is something of value in marriage that we think should be protected as a societal consensus and understanding of what marriage means. If we start to kick away selectively at certain things associated with marriage, it is very difficult to say what things will stay and what things will not. We know that things like fidelity and permanence are under pressure. If we start to say that there is no inherent need to even consider procreation at any level whatsoever—that it does not really matter, that it is just any two people—that seems quite an arbitrary basis on which to construct a societal consensus around marriage.

CHAIR: I accept that. It was a comment made about the relationship between the biological mother and father. Relationship is there, in the instance I relate, but in a different sort of way.

Rev. Middleton: If I could add to that, the biological link is important, and that has certainly been reflected in all the comments being made about adoptions, forced adoptions, the stolen generation. But there is also a sociological level, and maybe that is so obvious that we do not pay a lot of attention to it. I have seven children so I have a little bit of experience in this area.

Senator CAROL BROWN: I am one of 13.

Rev. Middleton: My parents were from families of 13 and 11, and we are Presbyterians, not even Catholics, so we did better than some Catholics.

CHAIR: That is a discriminatory comment!

Rev. Middleton: I would take that as a bit of loving fun! There is a sociological reality. We have these debates where it is as if we are saying that men do not matter to a relationship, or a mother or a father do not matter, that all that matters is love. I say that love is important and I know, and you would acknowledge this, that there is a messiness about relationships—I get all of that. But men are significant, fathers are significant. We all know this intuitively because if I were to ask you who was wrestling with my five-year-old and seven-year-old last night you would probably guess it was me. It is not that my wife does not do that or could not do that, but that is the sort of stuff that I tend to do. There have been lots of studies that show that those things that seem almost silly to talk about are how you socialise boys, that is how boys learn how to play and use aggression but be able to manage that in a way that is socially acceptable.

Increasingly there is data and research on the sociological importance and complementary nature of both a male and a female to the healthiness of how a child is raised. There are exceptions, and I grant those, but what we are talking about is: what is the norm, what should we be aiming at? That is what we are arguing, in as generous a way as we can. We are saying the state should make laws for the ideal, not the exceptions. I think the ideal would be to have a husband and a wife, a mother and a father, that are biologically linked to the children. While you have loving homosexual parents they will come out quite well—I am not saying they are doomed or anything like

that, of course not—but the ideal would be that they have both a mother and a father who will both contribute something to the rearing of that child.

Senator CAROL BROWN: I think parents, whatever shape or size they come in, will play with their kids and wrestle with the children. I understand what you are saying and where you are coming from. I am just not sure that it helps me, because I do not see how that is any different if it was a same-sex couple playing with their children.

Rev. Middleton: Because females and males are complementary. I do not believe they are just duplicates of each other, not just at a biological but even at a social level, so they would both bring something to the table. If we were to deny that then we might as well say that, apart from just biological reasons, men are useless, that they do not contribute anything other than what a woman can contribute; or, vice versa, we might say that, apart from biological production, women do not contribute anything peculiar to that relationship. We would say that at the sociological level that would not be true, that both men and women bring certain things. These are generalisations, I grant that, but I think the generalisations would stand scrutiny over a period of time. Women generally, not exclusively, tend to be nurturers and carers. Men bring other things to the table. That is the point I am trying to raise. Where, by design, you rule out one or the other—and you would do that in homosexual marriages because there would only be male or female—then that is not the ideal for children.

Miss Joseph: On that point, footnote 16 of our submission references a review by the Institute for American Values—page 4 of our submission. It is called *Mother bodies, father bodies: how parenthood changes us from the inside out*. It references a number of studies that look at the different ways men and women nurture children—the particular strengths that they each demonstrate.

CHAIR: We have perhaps gone a little bit beyond the time, and also the direct relevance of this bill, which relates to recognition of foreign marriages, although for the reasons we mentioned earlier—where everyone, including Senator Hanson-Young, admits that this is the thin edge of the wedge, if I could say that—the debate has ranged a bit more widely. Before we close, is there anything anyone particularly wants to say about the bill as such? I am not inviting you to do that if you do not, because I guess we have heard most of the arguments on both sides so far. But if there is anything that anyone would like to say about the recognition of foreign marriages—

Rev. Jobberns: My sense is that what we have heard again this afternoon the reality that this bill has really just caused us to talk about the bigger issue, which my colleagues have always reflected on. We are in the process of redefining marriage in Australia. And we would not be helped if this committee was to approve this bill going forward, because that would only continue to confuse the issue. I think really the issue now for us as Australians is to agree that we are in the process of redefining marriage. What is that going to look like in Australia, and how do we do that? So I would just encourage the committee to say, 'While we appreciate the opportunity this bill has raised to raise those broader questions, the reality is that there is not a lot in this bill that merits it going forward on the basis of it really trying to redefine marriage.'

CHAIR: A number of submissions say that this bill being passed would actually set up another discrimination, because those in Australia who want same-sex marriages are discriminated against from those overseas. Perhaps the wider debate needs to be had again, although I take you point that parliament does spend a lot of time on this. But there are a lot of issues that in my opinion are unworthy of any sort of debate that we spend a lot of time on in parliament! That is what we are paid to put up with, I guess.

If there is nothing else, I again thank you all very much, not only for your appearance today but for the submissions that you have obviously put a fair bit of time into. We appreciate that. So, thank you very much.

Committee adjourned at 15:32