



**The
Australian
Family
Association**

**LAPCSESC
Civil Partnerships
Submission 1673**

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Re: The Civil Partnerships Bill 2011

Submission to

**The Research Director
Legal Affairs, Police, Corrective Services
and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000**

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**To Ms Amanda Powell,
Research Director,**

Please accept the following submission from the Queensland branch of The Australian Family Association.

Summary:

The *Civil Partnerships Bill 2011* (the bill) proposes a register for a new type of relationship in Queensland law. The proposed register is not needed in Queensland as it would not give any benefit to the common good of Queenslanders and would in fact harm the institution of marriage by mimicking marriage and placing the value of marriage into question by an act of state parliament.

This Bill appears to be an attempt to elevate the status certain same-sex sexual partners beyond their current status which is the same as their fellow Queenslanders who are *de facto* partners/spouses.

In this way the Bill, which discriminates unfairly against the *de facto* community and seeks to mimic marriage, could be in breach of Australian's constitution which allows only the Commonwealth government to legislate in relation to marriage. The Member for Mount Coot-tha publicly and emphatically denounced any argument along these lines as mere sophistry, yet this bill and Mr Fraser's reasons for tabling it are exactly that, sophistry: tricky, superficially plausible, but generally fallacious method of reasoning.

Marriage should not be mimicked or diluted in its legal standing for many reasons, which, until recent times, did not require explicit explanation.

Mr Fraser wants the debate to be solely focussed on an upfront analysis of the hard facts of human relationship, and that is exactly what the AFA hopes will take place.

In summary, this Bill should be rejected, though some valid arguments exist for a register for genuine co-dependent domestic relationships that are not necessarily sexual in nature.

Current legal standing of same-sex partners in Queensland

“Spouse” is defined in Queensland in s36 of the *Acts Interpretation Act 1954* as including a de facto partner. “De facto partner” is defined in s32DA of the *Acts Interpretation Act* as a reference to one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family. Whether the parties concerned are living together as a couple on a genuine domestic basis depends on the circumstances of each case and the relevant circumstances are set out in s32DA(2) of the *Acts Interpretation Act*. Section 32DA(5) of the *Acts Interpretation Act* provides that the gender of the persons is irrelevant. Thus same sex couples are regarded as equal to heterosexual couples who are not married to each other.

On death, if the deceased person left a will, the estate would be distributed in accordance with that will. However, a same sex partner could apply (as a “spouse”) to the court for provision from the estate if that surviving partner considers that adequate provision has not been made for him or her by the deceased. There have now been about five cases in NSW where such applications have been successful. There have not been any cases in Queensland even though the legislation was introduced in either 2002 or 2003.

If the deceased person did not leave a will, the intestacy provisions apply. In the absence of legislation, a same sex partner would not be entitled to anything from the estate. However, s5AAA of the Succession Act 1981 allows the surviving partner to be regarded as a “spouse” of the deceased, and thus entitled to a spouse’s share, if he or she were the de facto partner of the deceased as defined in s32DA of the *Acts Interpretation Act 1954* and the two persons had lived together as a couple on a genuine domestic basis for a continuous period of at least two years ending on the partner’s death.

In effect, in Queensland, same sex couples are given equal treatment with heterosexual de facto spouses. In both cases they have to prove that they were living together as a couple on a genuine domestic basis for at least two years before the partner’s death. Obviously, if the family accepts the relationship, the survivor should have little difficulty inheriting a spouse’s share in intestacy. If the family does not accept the relationship, a legal fight will ensue.

The Civil Partnerships Bill 2011 seeks to elevate the status in law of same-sex partners above the status of a *de facto* ‘spouse’(where they are now) to a status equalling that of a married person.

Why the bill should be rejected

In the debate about redefining marriage, same-sex civil unions are occasionally proposed as a healthy compromise. The truth is, just about everyone in the debate thinks civil unions are a bad idea. Here’s why.

1. Supporters of same-sex marriage don’t want civil unions

The main reason that supporters of same-sex marriage oppose civil unions is that they create a two-stream system; opposite-sex and same-sex relationships are deemed to be “separate but equal.” According to same-sex advocates, this isn’t good enough.

As same-sex advocacy group *Australians for Marriage Equality* states on its website:

A number of courts around the world have ruled that schemes separate from marriage cannot be equal to marriage. Most recently, the California Supreme Court ruled on 15 May 2008 that giving the unions of same-sex couples a name that was separate and distinct from marriage reduced gays to "second-class citizens".

2. Civil unions are part of an incremental strategy to redefine marriage

Where supporters of same-sex marriage *do* support civil unions, it is only as part of an incremental strategy to eventually redefine marriage. Writing in the *New York Review of Books* in 2009, reviewer David Cole had this to say about the decision by two US state supreme courts to redefine marriage:

The fact that the legislature had already extended virtually all the benefits and rights of marriage to same-sex couples under the rubric of civil unions or domestic partnerships was crucial to the legal victories.

Indeed, Cole lays out the incremental strategy in explicit terms:

In Gay Marriage, [the authors] ... advocate a strategy focused on civil unions, although on more pragmatic grounds. Citing an article by Professor Kees Waaldijk, who helped develop the strategy behind the Netherlands' recognition of same-sex marriage, [the authors] argue that the best way forward is incremental.

On this view, states (or nations) are likely to recognise same-sex marriage only after a step-by-step process in which they first eliminate laws criminalising homosexual sodomy, then amend anti-discrimination laws to cover sexual orientation, then extend some government employment-related benefits to same-sex partners of civil servants, and then enact a domestic partnership or civil union law.

Clearly here in Australia we are already some way down the incremental road. Civil unions are not a compromise destination. They are a stepping-stone to the total redefinition of marriage. If you don't think marriage should be redefined, then you simply can't support same-sex civil unions.

3. No one has bothered to explain the state's reason for registering same-sex unions

There is a great deal of confusion in the marriage debate about what is really at stake. Ultimately, we need to be asking: why do we have a legal mechanism for recognising and registering intimate, personal relationships at all?

The state has a unique interest in the heterosexual union

Marriage, as it currently stands, reflects the state's general interest in the comprehensive heterosexual union. This interest has nothing to do with helping people celebrate being in love, or making a special commitment to one another. Those are private matters, not matters of public law.

The state's interest in the heterosexual union relates to its inherently life-giving nature. This is the only kind of relationship which, by its very nature, is predisposed to creating new life.

That simple biological fact has a whole lot of consequences, and not just for the couple. Any children that a heterosexual couple conceive have an obvious interest in whether or not they will have the opportunity of growing up in a stable environment with their own (i.e. biological) mum and dad.

And it is in order to protect the child's interest in growing up in just such an environment that the state takes the extraordinary step of encouraging permanence and fidelity in heterosexual relationships. This is precisely what the legal institution of marriage is for.

The state doesn't have the same interest in same-sex unions, or other relationships

But this reason is inescapably linked with the life-giving nature of the heterosexual union, and it obviously doesn't translate to same-sex unions, which are inherently sterile.

If the state were to decide to register same-sex unions, it must explain why. It would be poor public policy to simply assume that, because the state has an interest in registering heterosexual unions, it must automatically have an interest in registering same-sex unions too.

What's more, if the state *were* to decide to register same-sex unions, we would be left scratching our heads as to why other kinds of unions cannot be registered. Why, for example, couldn't we register friendships? Are friendships less significant than romantic relationships?

Or what about polyamorous or polygamous relationships? Does excluding people who engage in such relationships from marriage mean that they are "second class citizens"? Of course not, and the state would be right to refrain from registering such relationships. After all, the general rule is for the state to stay out of the realm of private, personal relationships.

Marriage is an exception to this rule, because, as explained above, the state *does* have a unique interest in the only kind of intimate, personal relationship which is inherently predisposed to generating the next generation of citizens with a prior life-long commitment to stay together to raise and nurture those same children: something the state wishes to avoid it having to do in their place.

The basic purpose of the institution of marriage is to mark the unique, life-generating significance of the heterosexual union; to set such unions apart as being of special significance.

If there is a case to be made for the registering of other companionate, familial or carer relationships, so be it. But the utility in registering such relationships should be clearly distinguished from the state's unique interest in registering exclusive, permanent unions between a man and a woman.

Marriage – as the union of a man and a woman, to the exclusion of all others, for life – makes sense. That's why it's in our law. So far, the case for registering other relationships hasn't really been made at all.

4. The current discrimination in Queensland law between same-sex partners and married spouses is small and it is fair.

There should be discrimination in favour of married spouses in law. This is based on sound reason and the biological connection between children and their parents. A married couple are, in principle, fertile and any children that they raise have a right to their biological parents. The married couple, unlike the *de facto* couple, have publicly declared with promise to stick together. For this reason “the state” should preference this arrangement as it decreases the likelihood of “the state” having to intervene to help raise any children born to that couple.

However, to be fair, state and federal law recognises the lived reality of the *de facto* marriage, and whilst the *de facto* community humbly accept they do not fit the definition of marriage, they enjoy equality in all civic law etc. In the same way same-sex couples, particularly since the previous Rudd government amended over 100 laws, enjoy equality with the *de facto* couples in all civic, domestic and financial matters.

In Queensland law a same-sex partner is treated exactly the same in law as a *de facto* spouse. The bill therefore is totally unnecessary, unless for the sole reason of mimicking marriage in every way but name. Mimicking marriage is damaging to marriage, as the two are not the same.

5. The bill would undermine Commonwealth law on marriage.

Only the Commonwealth has the power under Australia’s constitution to legislate on marriage. As marriage is the union of a man and a woman, freely entered into for life, to the exclusion of all others, it is always, in principle, capable of procreation.

Marriage is by definition carefully and justly discriminatory. Any Australian can get married if they meet the criteria. The two intending spouses must be adults, of the opposite sex, not closely related, not married, not forced, and intending for a lifelong union.

6. Children have a right to know and be raised by their biological parents, wherever possible.

Moves towards marriage for same-sex couples raises the question.... “Will more kids now become the “right or property” of adults”? The UN declared in its [Convention of the Rights of Children](#) Sec 7.1, that every child has a right to be raised by its mother and father. This bill will lead to an abuse of children’s basic right to a mum and dad, as has already taken place in Queensland’s surrogacy legislation.

7. A costly burden on the state.

The bill proposes (in order to convince us it is trying not to impinge on marriage) a wholly new registration category for “civil partnerships notaries”, which would place a cost burden on the judicial system too large proportionally, in our view, for the number of Queenslanders that would use this service, given it would make no practical change other than appear to “validate” the private love between two same-sex persons.

We would recommend the committee research just how many people utilise the relationships registers in Victoria, New South Wales, Australian Capital Territory and South Australia during the committee scrutiny of this bill.

When doing a cost/benefit analysis it is clear there is little, if no, benefit to the state for this elaborate measure considering that no children come from these relationships, and no civic discrimination exists for same-sex couple in federal or state law.

The question is why do we need this bill if it won't make a practical change for the partners it refers to? The Member for Mount Coot-tha agreed it won't make a practical change when asked in the public hearing November 4th, and then went on to say this is a valid reason for supporting the bill! In other words, the only reason to support the bill is to give some validation to certain same-sex partners.

8. Same-sex couples do not need the state to validate their love or commitment

It is sad that the Member who tabled the bill believes the state law is required to validate the love and commitment between two people. This is clearly an absurd proposition. And according to Mr Fraser, the only reason the bill should be supported, as no practical change would take place in day to day legal dealings for these partners.

The only reasons a government would consider formal recognition of a private relationship or a sexual relationship is if there was some compelling reason for the common good of all to do so. This has occurred in respect to marriage, only because it is a proven institution that benefits the raising of children as new citizens. There is no other reason.

Married couples do not need the state to validate their love, in more than same-sex couples. If a same-sex couple can't find validation amongst friends for their committed relationship, the last place to go looking for it is from the state!

9. Same-sex couples are already free to have private ceremonies, commitments and the like.

It is often put forward in debates like this one, that same-sex couples would be committing an offence if they were to conduct (as in marriage) a private ceremony with friends and exchange pledges of commitment and have a party. This is utterly false. It is simply that the government has no reason to formally recognise this private occasion.

10. Due process

The Member for Mount Coot-tha publicly stated that "Hiding behind due process is the last defence of a coward" yet praised the Queensland government new committee process. Does Mr Fraser presume that Queenslanders will have a chance to ponder the ramifications of his bill within 1.5 weeks before closing submissions on November 4th. Will Mr Fraser perhaps urge the government to declare his bill urgent, thus bypassing committee process in order to have his bill debated before the end of November to meet the desire of the government to have this 'over by Christmas'?

11. The bill would not solve any injustice but create new injustices.

Contrary to the sponsoring Member's public assurance that this bill will do justice, and to delay it would be to delay justice the AFA argues that, in fact, the bill would be an injustice to Queenslanders. The bill does not correct any injustice but creates some new injustices. It would do this by mimicking the recognition of marriage without any sound reasoning based on the hard facts of human relationships. It would give Queensland the false

impression that the state is required to validate private sexual relationships. It would create misunderstanding in young people that there is little value to man/woman marriage because they will see, or read about the states “recognition” and of the optional “ceremony” of this civil partnerships.

These grave and onerous burdens facing married couples who are open to begetting and raising the next generation justly deserve to be favoured by the state in certain matters (like taxation). None of these grave burdens fall upon the same-sex couple yet the Member for Mount Coot-tha would like to treat them as though they were the same in every way but name.

12. Likening opposition to this bill, with historical opposition to recognising *de facto* marriages is a furphy

The sponsoring Member’s public statement that opposition to his bill is similar to historical opposition to the recognition in law of *de facto* marriages is absurd.

Giving some recognition to *de facto* marriage does not disrupt the key principle for recognising marriages, which is the potential fertility of the couple and the subsequent and onerous task of raising children.

However, the key principle is thwarted if you were to offer the identical recognition of same-sex couples whose relationship is, in principle, sterile and therefore has none of the grave responsibilities attached to a procreative relationship nor benefits for the state.

Some valid arguments for a broad domestic partner/relationship register

Whilst it is not technically needed in law to protect and serve those in genuine co-dependent domestic relationships, there would be some benefits for such relationships including making some legal arrangements easier to manage.

It was for this reason the SA parliament decided to broaden the original debate about civil unions for same-sex couples to include the many co-dependent domestic relationships (like that of two aging siblings).

(Reference: http://www.austlii.edu.au/au/legis/sa/consol_act/fra1975233/ - SEE PART 3, which resulted from the Domestic Partners Bill (which amended 80-odd acts, but the *Family Relationships Act* contains the definition of ‘domestic partner’).

International movement to protect marriage

Margaret Datiles, J.D., an Associate Fellow of the Culture of Life Foundation (NW, USA) on July 26, 2011, in an article entitled: ***A Nation Divided: Same-Sex Marriage Progresses in Court and Congress, but Loses at the Ballot***, had the following summary observation:

"Although the national media highlighted the enactment of the New York same-sex marriage law, it ignored the recent approval of two constitutional marriage amendments in Indiana and Minnesota defining marriage as between one man and one woman. Indeed, the media's focus on the successes of same-sex marriage advocates has effectively eclipsed the successes made by traditional marriage supporters, creating a false public perception of the acceptance of legal same-sex marriage in America."


The argument is put that "it's inevitable". Six US states and the District of Columbia have legalised same-sex marriage; will it inevitably spread across the US? The facts are that in the six states and the District of Columbia, where homosexual marriage has been legalised, it has been imposed either by activist judges (as in Connecticut, Iowa and Massachusetts) or by state legislatures (as in Vermont, New Hampshire, New York and Washington DC).

Yet, in all of the 30 states where referenda have allowed the electorate to have the final say on whether or not marriage should be between one man and one woman only, the majority have always voted for traditional marriage.

Thank you for taking your time to consider our submission.

We treat this bill as a grave matter pertaining to the protection of certain social goods and it should not be treated lightly.

Sincerely,



Michael Ord

Queensland President

on behalf of the Queensland Branch of the Australian Family Association.