

1 EXECUTIVE SUMMARY

This book¹ sets out the case for making a simple change to the law to enable same-sex couples to marry in Australia.

It is an argument in support of **marriage equality**. This term encapsulates the simple proposition that same-sex couples should have the same access to lawful marriage as their heterosexual counterparts.

The reform we seek would simply expand and make more equitable the definition of who can marry in Australia. It would not change the nature of marriage.

We argue that the Commonwealth Parliament must legislate for same-sex marriage, not least because the national Parliament has an obligation to respond to human needs and aspirations by ensuring that the law reflects social reality.

We set out the significant social, cultural and legal changes over the past 150 years which provide a firm foundation for enabling same-sex marriage. We demonstrate the level of support for same-sex marriage across the social and political spectrum. We compare Australia's failure to enable same-sex marriage with progress in other jurisdictions. We examine the case against same-sex marriage in detail and consider possible alternatives to same-sex marriage.

Finally, we argue that the Commonwealth Parliament should address same-sex marriage as a conscience matter.

The book comprises an Introduction and eight principal chapters, most of which have sub-chapters.

The **Introduction** provides an overview of the case for same-sex marriage in the context of the High Court of Australia's decision in *Commonwealth v Australian Capital Territory (2013)* which dealt with the Commonwealth's challenge to the ACT's marriage equality law.

Marriage Equality in Context considers the enduring significance of marriage in a society which has become increasingly culturally diverse and secular. We examine how Australian law has evolved to address these changes. Developments in marital and family law reflect the increasingly secular nature of marriage. We argue the importance of distinguishing between marriage as a civil institution and marriage as a religious sacrament.

Towards Marriage Equality examines the growing support for same-sex marriage, as expressed in surveys, through the media, and by religious and political leaders. Changing attitudes has resulted in several overseas jurisdictions legislating for marriage equality and same-sex marriage bills being introduced into some Australian Parliaments.

¹ This book draws extensively on our submissions to the 2012 inquiry by the Senate's Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2010* (June 2012) (Submission 193 at <http://bit.ly/1n9bbRu>) and to the 2013 inquiry by the NSW Legislative Council Standing Committee on Social Issues *Same-sex Marriage Laws in NSW* (Report 47, July 2013) (Submission 1257 at <http://bit.ly/1g8L1st>).

International Recognition of Same-Sex Marriage demonstrates how same-sex marriage has become a reality in many international jurisdictions, including jurisdictions with which we share a common heritage. These developments are increasingly significant for Australia. Same-sex couples from Australia have been marrying overseas, for some time, and their numbers are increasing. Recent changes have also enabled same-sex couples to marry at the British High Commission and British consulates, if one partner is a British subject. These developments raise challenging legal issues.

Developments in Australian Jurisdictions examines the attempts to legislate for same-sex marriage at the national level and in the states and territories. The political context of these attempts is explored, including shifts in position of the major political parties.

Opposition to Same-Sex Marriage examines the basis of the opposition to same-sex marriage, concluding that much of it is motivated by a strong prejudice against homosexuality. This chapter also questions whether such a prejudice should have any role in determining public policy in relation to civil same-sex marriage.

Alternatives to Nationally Legislated Same-Sex Marriage considers various alternatives to same-sex marriage, pointing out that while they approach equivalence, they do not achieve equality. These alternatives include being recognised as a de facto couple, various registration schemes, civil partnerships and civil unions. In some jurisdictions these schemes may confer rights and obligations on the partners in a same-sex relationship. In others they may provide nothing more than evidence of the existence of a de facto relationship.

We also consider the issues surrounding the states and territories legislating for same-sex marriage. This would enable same-sex couples to marry, say they are married, be treated as a married couple under state-based legislation, and deliver some of the public benefits of marriage. Other jurisdictions may recognise such marriages, but this would depend on their own marriage laws. In Australia, only those states or territories which provided for same-sex marriage would be likely to recognise same-sex marriages solemnised in other states or territories.

At the Commonwealth level, a state or territory based same-sex marriage would be regarded as nothing more than a de facto relationship. Accordingly state or territory based same-sex marriage would not provide marriage equality for all Australians.

Why a Conscience Vote? outlines the history of conscience votes in the Australian Parliament and their importance in debates relating to marriage and family law, human rights and other issues. In particular we question whether Prime Minister Abbott's attitude towards conscience votes is influenced by his experience as Health Minister.

In providing this background, we recognise that political parties are free to make their own decisions about how they conduct their internal affairs. We hope however this background will assist Members of Parliament in making informed decisions about when they should be free to exercise their individual judgements and cast a vote according to their own considered consciences.

A Final Word considers the impact marriage equality could have on same-sex couples and calls for political action.