

DRAFT EXPOSURES; LEGISLATION AND CONSEQUENTIAL AMENDMENTS

The breadth of protection proposed in the *Religious Discrimination Bill 2019* is so wide that it subverts the rationale of anti-discrimination laws. The tension or conflict between claims of religious freedoms, on the one hand, and equality rights claims made by LGBTQI+ people on the other, is well documented.

There appears to be an ‘absence of unanimity’ as to whether discrimination on the grounds of religious belief should be unlawful or not – prohibiting discrimination on the grounds of religious belief is generally consistent with the rationale of human rights and anti-discrimination law. However, religion is already privileged in anti-discrimination law and there are concerns as to the extent to which the law has been complicit in the historic and ongoing marginalisation of LGBTQI+ people – from the criminalisation of homosexuality to the lack of recognition of same-sex relationships. This history of marginalisation, and the extent to which the law has denied the humanity of LGBTQI+ people animates concerns about the proposed legislation.

EXPOSURE DRAFT (29 August 2019)

Religious Discrimination Bill 2019

No. , 2019

(Attorney-General)

A Bill for an Act relating to discrimination on the ground of religious belief or activity, and for related purposes

‘I just think that it’s a massive step backwards because it’s allowing people, in a sense, the right to discriminate using false grounds. There’s all those examples of the bakeries going, “Well, I can’t bake you a cake for your wedding because religion says no,” which is absolute crap. There’s nothing. The two don’t marry up, but people will use it as an excuse to do so.’

A key theme, and one that has been stressed repeatedly by many of the participants in interviews is that marriage equality is not in fact about marriage. Rather, it is about human rights, civil rights, and equal participation. Many participants noted that while they were not personally interested in marriage, or at least were not in the past, the fight for marriage equality was important because of what it represented for wider equality and acceptance in Australian society. This emphasis on the importance of civil and legal rights was equally matched by an acknowledgment that the process of a postal survey did not support the needs of the community. In fact, the process emphasised that the right to be recognised as equal was now up to the votes and opinions of strangers across the country, rather than a process of democratic debate within parliament. This ‘outsourcing of democracy’ was criticised as a way for the government to distance itself from any outcome, and in the process resulted in increased exposure to bigotry, homophobia, and wider discrimination during the inflammatory debates that came alongside the postal survey.

Larger-scale empirical research has demonstrated the extent to which the postal survey legislative process stigmatised members of the LGBTQI+ community and had an adverse impact on their mental health.

75% YES! vs 25% NO... NEWCASTLE ELECTORATE VOTES

“I’m happy to be living in somewhere like Newcastle with that idea of the 75% being Yes. Although it does make me constantly think about the 25% who aren’t willing and obviously it’s never going to be, unfortunately, a hundred percent maybe for quite some time.”

The process of advocating for marriage equality was an active fight – it combined individual and community activism, but it also meant that members of the community had to be vigilant about supporting each other during this time, as the debates exposed many people to both overt and subtle forms of discrimination and abuse.

When the community was asked about why the issue of marriage equality was so important, it was commonly acknowledged that the issue wasn’t about marriage at all. Rather it was about human and civil rights, about being recognised as equal, and about having relationships valued as equal to those of heterosexual relationships.

With a 75% Yes vote, Newcastle had the highest percentage of Yes votes from a non-capital city across Australia.

These issues of civil rights were predominantly focused on the area of marriage equality, but also included broader elements of support of all members of the LGBTQI+ community. Discussions around activism also highlighted a common trend, it was not just advocacy in terms of encouraging people to vote Yes, it was advocacy about having conversations about equality in a wide range of contexts.

An inevitable outcome of discussing the debates, and surviving the debates, was an acknowledgment of the success, and a recognition of the strength, within the Newcastle and Hunter communities.

‘okay, there’s a 75% chance that if I take my kid to Newcastle with my partner, that the people I interact with are going to be supportive of that. Only like one in 10 or something, or more than that, would be potentially judgmental. I saw that 75% to be something to hold on to.’

The fact is that the 25% of people who voted No was not something that could easily be forgotten, even when it was realistically noted that a 100% Yes vote might be a distant hope.

POSTAL VOTES, POLITICS AND POLICIES

In 2015 the Abbott led Coalition committed to a plebiscite on same-sex marriage—a policy Turnbull took to the 2016 Federal election. The government was unable to pass the Plebiscite (Same-Sex Marriage) Bill 2016 and then committed to a voluntary postal survey if the Senate again rejected the Bill. In August 2017 the Bill was defeated in the Senate and the government directed the Australian Bureau of Statistics to conduct a (non-binding) postal survey gauging views about same sex marriage. The validity of the survey was challenged by Andrew Wilkie, Shelley Argent (national spokeswoman of Parents and Friends of Lesbians and Gays) and Felicity Marlowe (member of Rainbow Families). The High Court confirmed that the survey amounted to a valid appropriation of funds and confirmed it was relevantly statistical information: *Wilkie v The Commonwealth* [2017] HCA 40. As a ‘survey’ the postal survey did not include any of the protections and regulations that would ordinarily apply to a referendum. The *Marriage Law Survey (Additional Safeguards) Bill 2017* was then passed—the purpose of which was to prevent hate speech in the campaign.

Debates were often framed as political, or were presented as the views of politicians and political parties. There was no way of separating the personal from the political, and the debates around marriage equality exposed many members of the community to constant messages of hate, or lies, or insulting messages about who they were. Some media operated as a platform for this form of bigotry and hate:

*‘A big one for me was TV ads. I think that really stood out. There were some positive ones, but there was a lot of negative ones and I think it’s just that whole memory of sitting on the couch night after night and seeing something quite insulting come up about you. And you see lots of ads...when it’s about you and you’re just sitting there thinking, “No one else, none of the straights have had to go through this. This is just absolutely ridiculous” ...and the lies that they made up on the ads. It was just so insulting.’ **

Discussions inevitably led to the nature of the postal vote itself, which was a contested form of deciding for or against marriage equality. The postal survey was decried as ineffective, as removing the responsibility for change from the government, and has been described as ‘an outsourcing of government.’

* quote from Dr David Betts survey of lived experiences of the postal vote in Newcastle and the Hunter

'There was that constant, just absolute fear. Every time I had to drive somewhere and have the radio on or have the TV on and see these really foul ideas being expressed, it was really heartbreaking a lot of the time. I did feel quite depressed.'

'I was always against the postal survey. I was not for it, I did not like the precedent that it sent where we were outsourcing our government. The whole point of our political system is to represent, is to elect a representative for our electorate, who goes to Canberra and represents us. And then they all go together, they pass legislation and they get their jobs done.'

'I think the first word that comes to mind is cowardice. They needed this so-called evidence which cost us so much money and then it wasn't even binding anyway. Everyone's kind of saying, "Well yeah, but I got my say," but if 100% of the population agreed with gay marriage, it wasn't binding anyway. If no one agreed with it, it's not binding. It's up to the government to step up and do their job and I just think we're in this disgusting area of Australian politics that is in absolute turmoil and no one is willing to stand up. They're so spineless.'

'I don't think there's ever a time where you just sit back and think you've achieved what you need to achieve and that there isn't a need for vigilance. Sometimes it's about protecting, but you also want to build on and progress a positive agenda. So my concern on the Religious Freedom... [Discrimination]Bill, of course people should have freedom to practise their religious faith in Australia. That's not the question. The question is how that intersects with other people's rights. If that is, as some people have suggested, if the debate around religious freedom becomes about the implementation of further discriminatory laws in Australia, then that will be more than disappointing. It would be a profoundly disturbing sort of outcome of that debate if that's where we ended up landing.'

* interview quotes from Dr David Betts survey of lived experiences of the postal vote in Newcastle and the Hunter

THE IMPACT OF MARRIAGE EQUALITY ON DIVERSE COMMUNITIES

The conversations around marriage equality touched upon a common idea, which was how the marriage equality debates impacted diverse communities, as well as who was being included in these discussions. Mainstream positive campaigning for marriage equality prioritised images and messages of cisgender lesbian and gay couples, and excluded conversations about less normative relationships and genders. The idea that wider aspects of equality were lost in the push for the Yes campaign was not an uncommon notion.

'I think because it was really presented in binary terms in its own way. In terms of this is about gay marriage ... and there was also that difference even in the terminology which goes to shaping people's public perceptions of it. As opposed to marriage equality, gay marriage, and that sort of expression, but it was very much this idea of two men marrying or two women marrying and that was it. There was no real acknowledgement of queer identities or different genders essentially.'

This lack of real acknowledgment of queer identities and different genders was felt strongly during the marriage equality debates, and was reflected in discriminatory actions and behaviour towards gender diverse individuals. A large amount of the backlash against the marriage equality campaign was primarily directed at trans and gender diverse communities, rather than directly focusing on the issue of marriage equality itself.

'You see that a fair bit ... even with how a lot of the public debate kept sort of shifting into talking about, something like transgender identities and Safe Schools Initiatives and things like that. That was a real push and it was still very much demonising and I really felt like that came from that space of going, "well, we can't outwardly say that we're going to actively discriminate against people who are gay, but we can still say, we're trying to look after the poor innocent children," despite spitting in the face of what the children actually need in that space.'

'For example, trans people, I think maybe their experience, because a lot of the arguments which were totally ridiculous were around like, "how bad would it be if a boy at school was to wear a dress." I feel like that could be really hurtful to that community, so it made me sad for the other people in [our] community as well.'

The disproportionate impact of the marriage equality debates on queer and gender diverse identities highlights the need for future work and future advocacy to support all aspects of diversity in the queer community.

'I guess a big divide there, or a big gap, would have been for the transgender community and the legality of where that leads. I'm sure not everyone's happy with the whole thing and there's always things to work on but the transgender community was probably a little bit neglected in the scoping of that, [and] that's something that can be worked on.'

MILESTONES TO EQUALITY

In 1995 Newcastle couple, Andrew and Bill Whitbread-Brown, launched a case against the health insurer NIB. The case was a significant milestone in the legal recognition of gay and lesbian relationships in Australia.

They were long term NIB members who were each paying a single rate, but when Andrew added his son and the couple applied for a family rate they were rejected. They were advised by NIB that if Bill was female, they would get family cover but because he was male, they couldn't. At the time, the family rate was \$1830 per year and they were paying \$2745.

TRIBUNAL

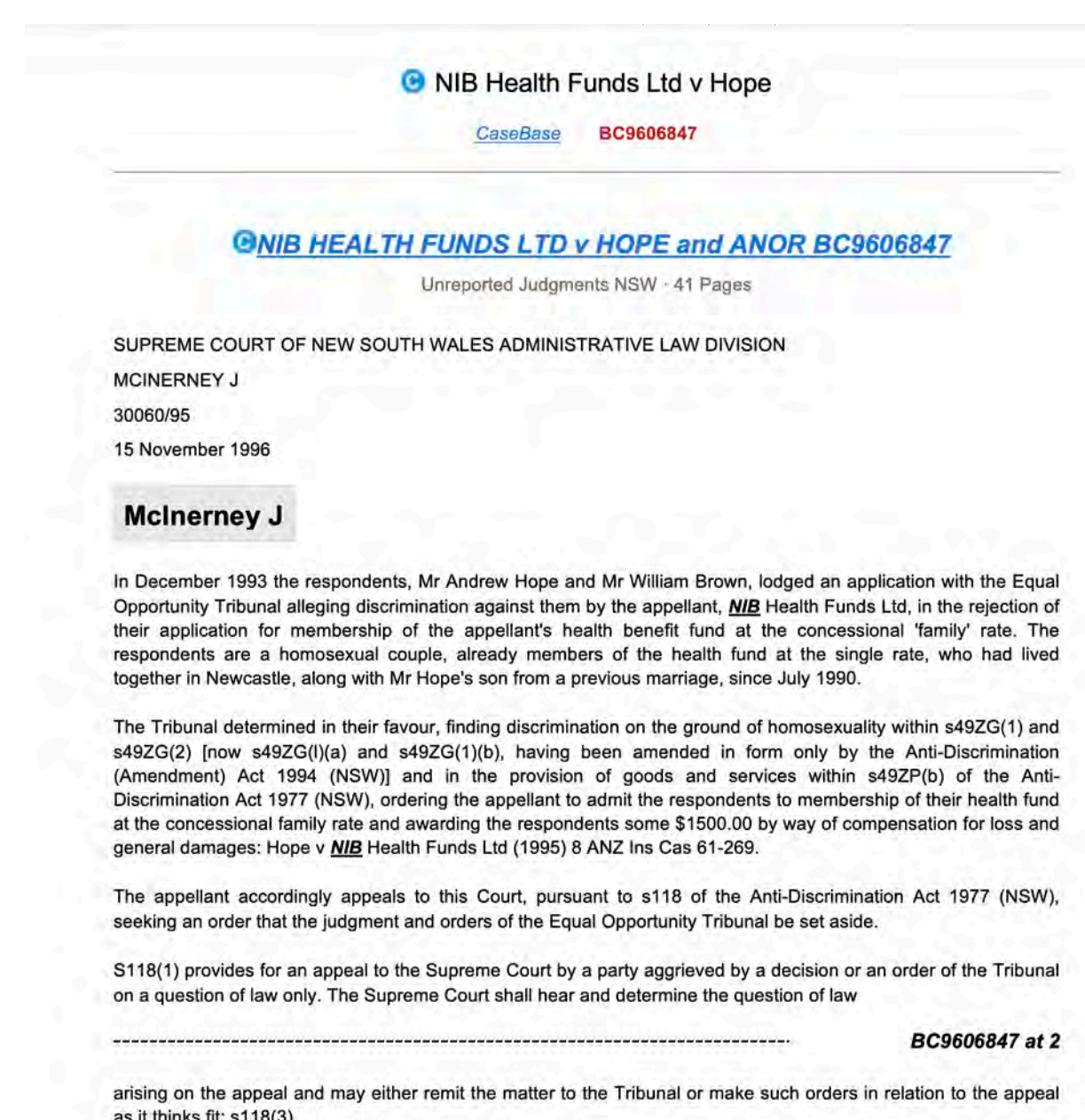
On the 20th of July 1995, The Equal Opportunity Tribunal ordered NIB to provide the couple with a family insurance policy within 14 days and to pay them \$1500 each in damages, after finding that the fund had discriminated against them on the basis of sex and homosexuality.

SUPREME COURT

NIB then appealed the decision in the Supreme Court, who also rejected their arguments and confirmed the rights of gay families to equality when seeking health cover. The legal costs of the couple came to \$15,000, \$4000 of which was raised by the Newcastle gay committee.

A LANDMARK RULING

Their legal battle against the health insurer NIB was a landmark ruling that extended family health insurance to same sex couples in NSW. It raised important human rights issues and came at a critical time for law reform for gay and lesbian equality.



1978 to 2016 AN APOLOGY

On the eve of the 2016 Mardi Gras, NSW Police and the State Government apologised for the arrests and beatings at the 1978 Gay and Lesbian Mardi Gras Parade.

On 24 June 1978 the first Mardi Gras was marked by a series of events in response to a call for an international day of action. A festive atmosphere was encouraged by organisers but the party mood of the late night march turned dramatically when police intervened to shut it down. The first Mardi Gras ended in violence and public shaming at the hands of police, government and the media.

'The early rainbow nature of the movement was evident, with transgender and Aboriginal people and people from migrant backgrounds all mixing in. We were a diverse and spirited group of a few hundred mostly younger men and women ready to march down Oxford Street to Hyde Park, along a strip that was becoming the centre of gay life in the city.'

Mark Gillespie *The Friday Essay*
<http://theconversation.com/friday-essay-on-the-sydney-mardi-gras-march-of-1978-54337>



On April 27, 2015, Christine Foster, a Liberal Party councillor and the sister of the then Australian Prime Minister, Tony Abbott, moved a motion at the Sydney City Council calling for a formal apology to the original gay and lesbian Mardi Gras marchers.

It was passed unanimously.



Known as the '78ers, many of the protesters had their names, addresses and professions published in the media after they were arrested.

In total, 53 people were arrested and beaten by police.

<https://www.abc.net.au/news/2016-03-04/nsw-police-apologise-to-mardi-gras-78ers/7219996>

HATE CRIMES AND THE GAY PANIC DEFENCE

.....a non-violent sexual advance being considered enough reason to downgrade a murder charge to manslaughter.

The **gay panic defence** is a discriminatory common law legal argument which could be raised to reduce the liability of the accused and allows for justification of conduct. It has been upheld in a number of cases *Green v The Queen* (1997) 191 CLR 334 and more recently in *R v Lindsay* (2015) 255 CLR 272.

The accused is required to demonstrate that their loss of control was due to sexual advances by a member of the same sex. It is used in cases of murder, manslaughter or assault. If this provocation defence was successfully raised in court, it would be regarded as a mitigating factor in the behaviour, and allow for a self-defence argument to be raised. Most states have enacted legislation to prevent the use of this common law defence in Australia. The only state where the defence is still allowed is in South Australia.*

* There have been widespread calls for reform in the media and by the South Australian Law Reform Institute in its report 'The Provoking Operation of Provocation: Stage 1.'

Hate Crimes....During the 1980s and 1990s, gangs of teenagers in Sydney hunted gay men for sport, sometimes forcing them off cliffs to their deaths. They were doing it with the almost-certain knowledge that the police would not have gone after them as the police, many of whom had a reputation for hostility toward gay men, often carried out perfunctory investigations that overlooked the possibility of homicide. Now the police are reviewing the deaths of 88 men between 1976 and 2000 to determine whether they should be classified as anti-gay hate crimes.

A 'prevailing acceptance of and indifference' to violence against gay men in the NSW community and police force led to a failure of justice and protection of victims prior to the mid-1990s. An interim parliamentary report into gay and transgender hate crimes in NSW between 1970 and 2010 found past attacks on the LGBTIQ+ community were "shocking, abhorrent and all too common".

About 30 of the cases remain unsolved, and the police have not said how many of the killings were tied to gangs. About a dozen victims were found dead at the bottom of cliffs or in the sea.

In September 2018, the case was referred to a specialist investigative team, who are conducting fresh inquiries into Scott's death under Strike Force Welsford. To assist with the investigation, the NSW Government has increased the \$100,000 reward to \$1million



On a December day in 1988, a teenager on a spearfishing expedition found a body at the bottom of one of the sandstone cliffs at Manly on Sydney Harbour.

Naked, torn and battered by the rocks, Scott Johnson was a promising American mathematician in Australia completing a PhD. His clothes were found at the top of the cliff in a neat pile with his digital watch, student ID and a \$10 bill, folded in a small plastic sheath. There was no wallet, and no note.

The police concluded within 36 hours that Mr Johnson, 27, had committed suicide, and a coroner agreed. However his brother, a wealthy Boston tech entrepreneur, pressed the Australian authorities for years to revisit the case, arguing that Mr Johnson was murdered because he was gay and that the police failed to see it.

A coronial inquest in 1989 found Scott had committed suicide, with a second inquest in June 2012 returning an open finding.

The matter was referred for a third inquest and in 2017, the then NSW Coroner Michael Barnes found that Mr Johnson fell from the cliff top as a result of actual or threatened violence by unidentified persons who attacked him because they perceived him to be homosexual.

VIOLENCE, FEAR AND MURDER



Some of the Star Observer's covers from the time of the bashings and murders

LGBTQI+ communities typically have lower confidence in police than the general population, in part as a consequence of police failure to properly investigate the murders of gay men. Calls for commensurate responses continue, with a NSW parliamentary inquiry into gay and transgender hate crimes (the inquiry continues into 2020).*

*This is despite Operation Parrabell – the police review in 2018 of 88 cases of possible gay homicides – and despite the considerable and ongoing community liaison with the LGBTQI+ community in Sydney through the NSW Police Force Gay and Lesbian Liaison Officer (GLLO) program.



Dr George Duncan, a gay law lecturer at the University of Adelaide, was killed in 1972 a stone's throw away at a riverbank in an attack suspected to have been committed by police officers.

The crime, still unpunished, revolted mainstream Australia and led the state of South Australia to become the first national jurisdiction to decriminalise homosexuality. In 1970s Adelaide, homosexuality was illegal.

It took 22 years to decriminalise homosexuality across Australian jurisdictions - starting in South Australia in 1975 and ending in Tasmania in 1997. This was compounded by the AIDS crisis in the 1980s and 1990s, and by the failure of NSW criminal justice institutions to take murders of many gay men seriously and properly investigate them from the 1980s to the early 2000s.

Police inertia in New South Wales was tacit encouragement to the perpetrators of 'gay hate crimes', and to the ongoing narrative of gay men as deviant. This narrative was replayed during the same-sex marriage debate and used as the basis for a moral argument against allowing same-sex couples to marry, further perpetuating overt discrimination and once again tacitly endorsing everyday casual prejudice against sexual orientation and gender identity minorities.



Notable to the Newcastle-specific focus of this exhibition is that the collation of some of those crimes and how they were dealt with by police developed out of research conducted at the University of Newcastle by Professor Stephen Tomsen and Dr Allen George.



The Mimi spirits are a feature of the Dreamtime stories and are perceived largely as genderless. Recognised within Aboriginal Culture as 'tricky and naughty', they often refer directly to sexuality.

The Tiwi Islands communities have language indicating sexual/gender diversity. Literature suggests that across Australia generally, it is likely that a kinship model existed which allowed for fluidity in attractiveness to any gender. As colonisation silenced Indigenous expression, little historic information is known.

IMAGE ABOVE:
Paddy Compass Namatbara 1890-1973 *Mimi Spirits associated with Love Magic* c1963 University of Newcastle Collection MA2010
Region: Western Arnhem Land NT
Community: Minjilang
Outstation: Croker Island

WAITING FOR EQUALITY

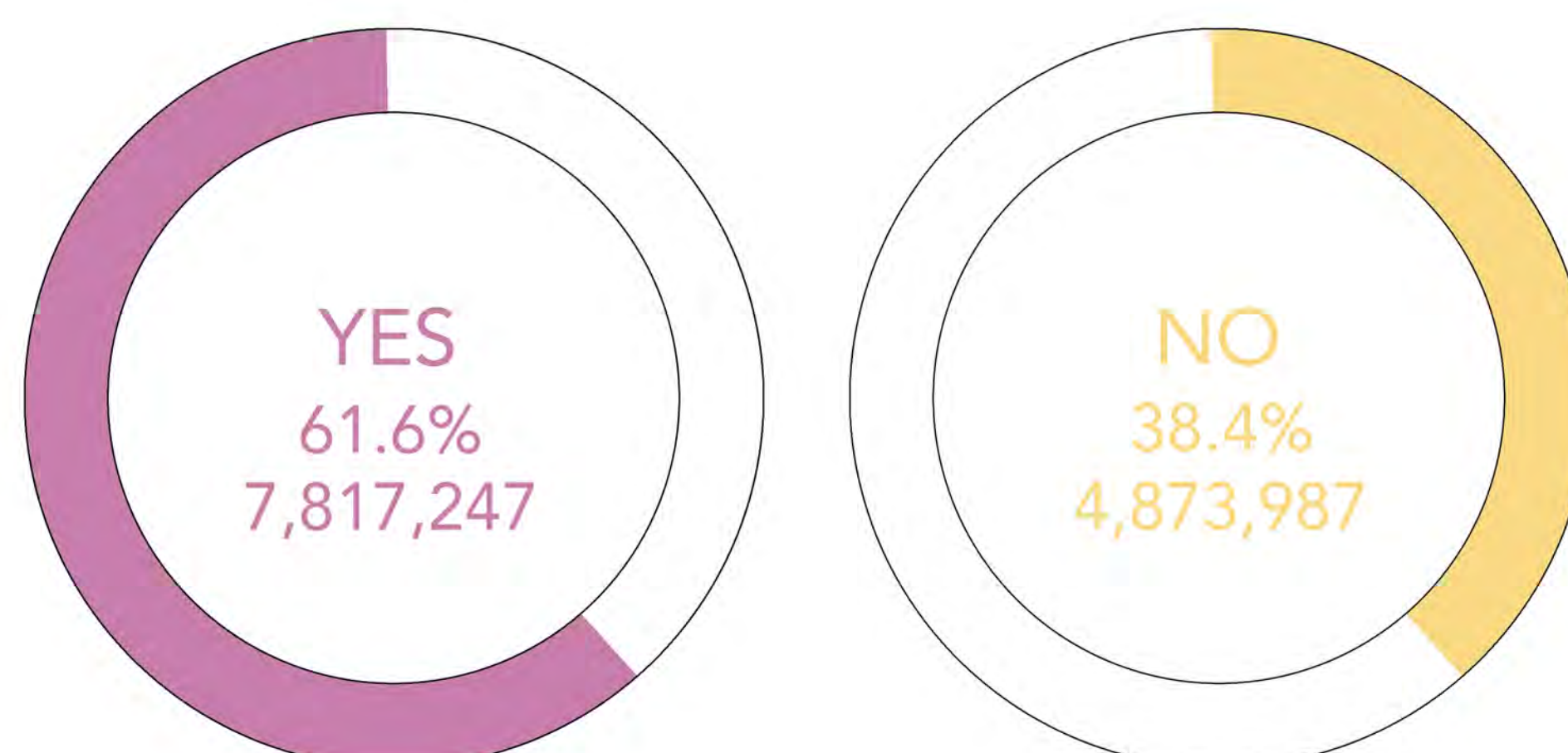
On 7 December 2017 the federal parliament passed the *Marriage Amendment Act 2017*, which made same sex marriage legal in Australia, marking one of the most significant social transformations of our era. This landmark achievement should be seen in the historic context of a sustained struggle for equality for LGBTQI+ people in Australian society.

Although marriage-like rituals for LGBTQI+ people have a long history pre-dating the era of legal recognition of same sex marriage, the radical gay liberationist/feminist critique of marriage in the 1970s saw it as a patriarchal and oppressive institution. This was a stance that reflected very different concerns of the time, namely: criminalisation of consenting acts between adult men (laws that took over two decades to reform across all Australian jurisdictions), and the inclusion of homosexuality in the influential Diagnostic and Statistical Manual of Mental Disorders (DSM). The World Health Organisation did not finally remove homosexuality from its parallel classification system until publication of the ICD-10 in 1990.

After centuries of discrimination, criminalisation and violence, the choice to marry was a milestone for human rights in Australia.

In the 2017 Marriage Law Postal Survey, the federal electorate of Newcastle recorded a vote of 75% in favour of allowing same sex couples to marry. This was the highest 'Yes' vote in Australia outside a capital city, and can be seen as a reflection of the city's long record of community activism and support for social justice issues.

NATIONAL YES/NO FIGURES



Overall participation rate for the survey **79.5%**

THE LAW AND THE LONG JOURNEY TO MARRIAGE EQUALITY

An important legal forerunner to marriage equality was civil unions or civil relationships. The first country to enact civil unions was Denmark in 1989, followed by a number of other European jurisdictions in the 1990s and beyond. With these developments in mind including the first cases of marriage equality legislation already introduced in Europe, the government of John Howard moved in 2004 to forestall legal recognition of same sex partnerships by amending the *Marriage Act 1961* (Cth). The pathway to marriage equality proved to be a long, hard fought struggle involving parliament, the courts, and a public vote before the law was eventually changed.

After a long tussle with the federal government, the ACT introduced into law the *Marriage Equality (Same Sex) Act* in October, 2013. The High Court decided unanimously that the ACT legislation could not operate concurrently with the federal *Marriage Act 1961* (Cth).

Although this outcome invalidated the ACT legislation, this was effectively a 'win' in the long battle for equality as it confirmed that the Commonwealth had the power to legislate for same sex marriage. The marriage power in s51 (xxi) of the Commonwealth Constitution is held concurrently with the states. Prior to this decision it remained unclear whether the *Marriage Act* 'covered the field' on the topic of 'marriage' leaving no space for a state or territory to make laws with respect to marriage of any kind.

Addressing the question of whether the definition was 'frozen' in the sense that marriage should be understood as it was understood at the time of Federation, in *Commonwealth v ACT* [2013] HCA 55, the High Court confirmed that 'Marriage' in s51(xxii) includes a marriage between persons of the same sex. This decision meant that no Constitutional amendment (e.g. referendum) was required to legislate for marriage equality.

LAW AND MARRIAGE: FROM THEN TO NOW

On 15 November 2017 Senator Dean Smith (LIB) introduced, on behalf of eight cross-party co-sponsors (Linda Reynolds (LIB, WA), Penny Wong (ALP, SA), Louise Pratt (ALP, WA), Richard Di Natale (AG, Vic.), Janet Rice (AG, Vic.), Skye Kakoschke-Moore (NXT, SA), Derryn Hinch (DHJP, Vic.) and Jane Hume (LIB, Vic.), a bill to amend the *Marriage Act 1961* (Cth) to redefine marriage as 'a union of two people'. This was the fifth marriage equality bill introduced in the (45th) Parliament.

Senator Smith's Bill passed the third reading stage (43 votes to 12) in the Senate on 29 November 2017; for the first time a marriage equality bill was debated by another chamber when the Bill was introduced into the House of Representatives on 4 December 2017.

The Bill (*Marriage Amendment (Definition and Religious Freedoms) Act 2017, No. 129, 2017*) passed the third reading stage (128 votes for, 4 votes against; at least 11 abstained) in the House on 7 December 2017 and received Royal Assent the following day.

The Bill amended the *Marriage Act 1961* (Cth) to: redefine marriage as 'a union of two people'; introduced non-gendered language so that the requirements of the Act applied equally to all marriages; enabled same-sex marriages that had been, or will be, solemnised under the law of a foreign country to be recognised in Australia; amended the definition of 'authorised celebrant' to include new categories of religious marriage celebrants and certain Australian Defence Force officers; enabled ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds.

In the almost 40 intervening years between the violent arrests of peaceful protestors calling for marriage equality at the 4th National Homosexual Conference (Sydney) in 1978 and the rousing scenes in Parliament House in 2017 we see the great power of the state as both oppressor and liberator.

Video 1 the moment parliament said 'yes'
Video 2 27 August 1978 4th National Homosexual Conference Sydney