# Full Day Hansard Transcript (Legislative Council, 31 October 2013, Corrected Copy)

Extract from NSW Legislative Council Hansard and Papers Thursday, 31 October 2013.

## SAME-SEX MARRIAGE BILL 2013

**Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Penny Sharpe.**

### Second Reading

**The Hon. PENNY SHARPE** [9.59 a.m.]: I move:

That this bill be now read a second time.

It is with great pride that I introduce the New South Wales Same-Sex Marriage Bill 2013 on behalf of the NSW Cross Party Marriage Equality Working Group. I am pleased to do so because I believe, as I have always believed, that equality before the law is a basic right of every citizen that no government or parliament can or should legitimately deny. It is time—it is past time—for our parliaments to remove the last vestiges of discrimination against gay and lesbian citizens. It is past time for our laws to reflect the reality that the residents of New South Wales are entitled to the same rights and are equally valued.

The right to marry is not just about the legal entitlements and responsibilities that recognised partnerships produce. The decision to share one's life, one's future, one's good fortune and one's hard times with someone else is one of the bravest, most challenging and most important decisions that any of us will make. It is an intensely personal and an incredibly significant decision and no Australian should be told by their parliaments or their governments that their choice is less worthy, their commitment is less enduring, their relationship less valid simply because the person they love is of the same gender as they are.

I am one of those citizens whose rights are denied by the current laws on marriage but, Mr President, so are you and so is every member of this Chamber and every person watching this debate because a right denied to some is a right guaranteed to none. To oppose this bill is to accept that it is right for a government or a parliament to arbitrate the reality of individuals' relationships. It has not been so very long since skin colour was a reason some relationships were legally categorised as lesser than others and denied recognition by the State. Indeed, it has not been all that long in historical terms since the cost of marrying denied the vast majority of people access to that legal recognition.

We changed our laws to reflect the reality that it is not acceptable for marriage to be restricted on the grounds of wealth or the colour of one's skin and every survey shows that Australians no longer believe it is acceptable for marriage to be restricted on the grounds of sexuality. It is time—it is past time—for our laws to change to reflect that reality and that is why introducing this bill on behalf of the NSW Cross Party Marriage Equality Working Group is a duty as well as a pleasure. As a parliamentarian it is my responsibility to represent the issues and the values of those who elect me. It is the role of Parliament in a representative democracy to make laws that reflect the wishes and the values of their citizens and it is unquestionable that the majority of Australians want this final piece of legal discrimination to end.

The Federal Parliament has failed to do so. Although the Federal Parliament has taken monumental steps towards equality, marriage equality remains elusive, at least in the short term. The newly elected Federal Government has indicated that action to remove this discrimination is not for it a priority. Unfortunately it is somewhat ironic that it has made it a priority to try to interfere with the right of the Australian Capital Territory to make laws for its own citizens. Like the majority of Australians, I would like the Federal Parliament to catch up to public opinion. However, regardless of whether or not it acts, the New South Wales Parliament has a responsibility of its own to the citizens of this State. I note that this is not unusual. The States have led the way on gay, lesbian, bisexual, transgender and intersex reform for many decades.

If we had waited for Federal Government action, couples in New South Wales would not have had equality until 2009. New South Wales acted a decade earlier. Our Federation has never been tidy. That may be the inevitable by-product of a nation whose Constitution spends more time talking about railway gauges than rights. But tidy or not, it works—so long as we make it work, so long as we do not use the complexities to excuse inaction, so long as we accept our responsibility to act, to represent our citizens and to recognise their rights. And we have a responsibility to act on this matter: to the gay and lesbian citizens of New South Wales, who are part of every

community in every electorate across the State; to their families and friends, who are also deeply hurt by the perpetuation of legal discrimination against those they love; to everyone in New South Wales who believes in equality; and to everyone in New South Wales who believes in the importance of marriage. Because it is not the end of discrimination that threatens the role of marriage in our society; it is the continuation of it.

Most people believe that marriage should not be discriminatory. Most people believe that the quality and the importance of relationships are not determined by the gender of the people in them. Most people believe that love is inclusive. Discriminatory laws will not make people change their minds about the validity and value of same-sex relationships. Discriminatory laws will, however, make sure that marriage becomes more and more an archaic, dated institution, reflecting the values of the past, irrelevant to the present and to the choices people make about their futures.

It is a rare thing to see a bill such as this brought before our Parliament via the work of a group of people across the political spectrum. The genesis of this bill was the establishment of the NSW Cross Party Marriage Equality Working Group. This group was established because each member of the working group saw the need to look to outcomes, rather than just fight the easier fight of putting gay men and lesbians at the centre of the politics of providing rights to same-sex couples. There is no doubt that when the working group was established the objective was to achieve marriage equality at a State level if it could not be achieved at a Commonwealth level.

What became clear very early in the process was that the objective of marriage equality for all couples was not achievable. Nevertheless, what was identified was that the working group could take a step forward towards marriage equality for same sex-couples through State legislation. The announcement of the working group led to a round of meetings with stakeholders and the preparation of the first draft bill. These steps in turn led the Premier to support the establishment of the terms of reference for the same-sex marriage laws inquiry by the social issues committee of this House. I take this opportunity to thank all members of that committee who worked diligently to produce a report that has brought some intellectual rigour to the debate on the constitutional issues surrounding the powers of the States to introduce such legislation as we are now debating. I must also thank all those who made submissions to that inquiry.

None of us should forget that the inquiry received more than 7,000 submissions, a number unrivalled by any other inquiry held in New South Wales. I also wish to thank in particular the various academics who gave evidence before the inquiry. Their evidence was invaluable, not only to the committee but also to the working group. Following the evidence given by academics to the committee, a number of amendments were made to the bill, including the title of the bill. The bill was originally titled in a way that implied it was delivering marriage equality. After advice, the working group now concedes it is not possible at a State level and would have weakened the bill. That is why the bill before us today was changed to being the bill for same-sex marriage. Throughout the entire bill the union being entered into is referred to as a "same-sex marriage". That is because the bill creates a new type of relationship, a type of relationship that avoids encroaching on the field that is covered by the Federal Marriage Act.

In the original draft of the bill, which was the draft that was examined by academics appearing before the committee, there was an attempt to try to include intersex people within the legislation. Unfortunately, it was almost unanimously decided by those academics that the relevant clauses of the first bill diminished the chances of the bill surviving a High Court challenge. These clauses were therefore reluctantly removed from the final draft. There is no doubt that Australia has a long way to go to give equality to all couples. Another area that was identified as a major concern with the first bill related to how that bill dealt with property upon the dissolution of the relationship. In the bill before the House, we have sought to deal with that issue treating a same-sex marriage as a de facto relationship and therefore falling under the jurisdiction of the Family Court of Australia.

These changes were subsequently examined by a constitutional law expert, who has confirmed the bill is robust and has good prospects of resisting a constitutional challenge. Clause 6 of the bill provides for marriage between two people of the same sex following a ceremony before witnesses. Importantly, the bill seeks to create a relationship status known as "same-sex marriage" and not "marriage". As Bret Walker, SC, has pointed out, expressions such as "de facto" and "common law marriage" have long been used to describe a status different from marriage: de jure marriage. In the same way the term "same-sex marriage" that is used in the Same Sex Marriage Bill describes a relationship status that is different from marriage. Bret Walker, SC, stated in an advice dealing with a similar Tasmanian draft bill:

> The mere use of the word marriage does not indicate the status is the same. To the contrary, the preceding words, de facto, common law or same-sex, serve to distinguish the status from marriage. The Same-sex Marriage Bill thus does not purport to regulate the status as the Marriage Act. By its terms it creates and regulates a different status. That is so whether the status is described as a civil union or a same-sex marriage, critically it is not described as a marriage.

Clauses 7 to 14 of the bill set down the steps to be taken by the parties in solemnising the relationship. It is fundamental to the bill that the parties undertake a ceremony that establishes the relationship. Unlike a de facto relationship, the same-sex marriage is entered into by a formal and public ceremony before witnesses. It is not created merely by the intention of the parties or by the passage of time; rather a series of formal steps must be performed in order to establish the relationship. Clause 5 of the bill also sets the grounds for eligibility, including

the age of the parties, the need for at least one party to be resident in New South Wales and for neither party to be validly married under Commonwealth law. The working group in its deliberations was of the view that it was important to ensure that a State-based marriage law was for the benefit of the citizens of this State.

Additionally, it was important to ensure there was no conflict between State legislation and the Commonwealth Marriage Act—hence the prohibition of entering into a same-sex marriage while being married under Commonwealth legislation. Clearly also it was essential to set down preconditions regarding matters such as age. Part 4 of the bill deals with dissolution and annulment of the marriage. The precondition to dissolution is the separation of the parties for at least 12 months. This precondition is similar to that adopted under the Commonwealth Family Law Act 1975. The requirement of a period of dissolution is a clear message to the parties that entry into a same-sex marriage is not simply a transient relationship that can be terminated by the actions and intentions of one party.

I will deal at this point with schedule 1.3 to the bill. The bill proposes that proceedings for property adjustment following the end of a same-sex relationship will be dealt with by the Family Court by amending the Property Relationships Act by inserting a new section 5 (1) (a), and also an amendment to section 5 (3) (c) (1). The effect of these amendments will be to equate a same-sex marriage with a de facto relationship for the purposes of proceedings in the Family Court for property adjustment. As all members know, property adjustments between former de facto partners are now dealt with in the Family Court. The amendments proposed in this bill will ensure that former partners in a same-sex marriage will be dealt with in the same way. This overcomes one of the criticisms made of the first draft bill by some academics before the State Same Sex Marriage Law inquiry.

It is important that I deal specifically with one further matter. Clause 11 of the bill has been specifically inserted to make it plain that no religious organisation can be compelled to either marry people of the same sex or make available their places of worship for any such ceremony. The bill explicitly states that religious organisations are exempt from doing so. I should further point out that even without this provision no minister of religion could be forced to perform a same-sex marriage ceremony. Part 5 of the bill provides for a system of registration of same-sex marriage celebrants. Additionally, clause 18 of the bill makes it an offence for any person to solemnise a same-sex marriage who is not authorised to do so, and such authorisation arises by registration under part 5 of the bill. The interaction of these clauses clearly has the effect of ensuring that ministers of religion cannot be forced to perform a same-sex marriage ceremony. The simple fact that they fail to register as a same-sex marriage celebrant makes them incapable of performing such a ceremony.

Much of the public debate surrounding this bill has focused on the legal complexities that come from our Constitution and, indeed, our Federation. We must not be deterred by the fact that this bill raises legal issues. It is hardly unusual for an Australian parliament to pass legislation that is subsequently tested in court. If parliaments refused to legislate in any area that might lead to a court challenge, then laws such as those that stopped the damming of the Franklin River, the introduction of plain packet tobacco legislation and, to give a very recent example of a decision in this place, the law that puts limits on who can donate to political parties, would never have been passed. No parliament can guarantee a court outcome: indeed, that would be fundamentally against the principles that underpin our democracy.

The best any parliament can do is to know that it has a strong and legally sound argument underpinning its legislation, and in this case the cross-party working group has. There is no reason that this bill cannot be passed by the New South Wales Parliament. I have, through the wonders of New South Wales Legislative Council procedures, the privilege of introducing this bill on behalf of the NSW Cross Party Marriage Equality Working Group, but many other people share the credit for it. I thank the members of the NSW Cross Party Marriage Equality Working Group: the Hon. Trevor Khan from The Nationals; the member for Coogee, Bruce Notley-Smith, from the Liberal Party; the former member for Sydney, Clover Moore, followed by Alex Greenwich, for the Independents; and Cate Faerhmann, followed by Mehreen Faruqi for The Greens.

I thank our hardworking staff and the New South Wales Parliamentary Counsel office for drafting and redrafting this bill. Our legal advisers Professor George Williams, Ghassan Kassisieh, Bret Walker and Anna Brown deserve great credit. I thank the members of the Standing Committee on Social Issues for their groundbreaking work and the gay, lesbian, bisexual, transgender and intersex community organisations that have been our fiercest critics but also our greatest supporters. Finally, I thank every same-sex couple in New South Wales and their families and friends who, no matter the outcome of this bill, will not rest until this discrimination is removed once and for all.

There are those who say that the removal of so many practical aspects of discrimination in recent years renders this bill purely symbolic. Even if that were true, it would not make it any less important. A clear statement by our elected representatives that all our citizens are equal, and equally entitled to rights before the law, will never be unimportant. A clear statement by our elected representatives that discrimination is unacceptable will never be insignificant. As far as we have come, there are still people in this State living in fear that admitting their sexuality will bring rejection, bullying, shame and violence. There are still young people in this State who get up every day hoping that no-one notices and no-one asks whether they are gay, a fag, a poof, a lezzo or a dyke—or much worse terminology is used. For the question is not asked to provide acceptance and love; it is a question that if answered honestly can bring terrifying menace.

There are still people in this State who have hidden from themselves, their families and their friends, often for decades, on the mistaken belief that they are abnormal, perverted or deranged, or that maybe being gay or lesbian will just go away. Even purely symbolic recognition of equality by this Parliament says to those people that the discrimination they suffer is not right, the fear they are made to feel is not justifiable, and the bullying they endure is not their fault. To insist on being treated equally before the law is never purely symbolic. Equality before the law is not a privilege, not an indulgence and not a whim; it is a right for which everyone who supports the principle of equality has a duty to fight.

This bill is for those who support equality—equality for themselves and equality for others. This bill is for same-sex couples who want to be able to celebrate their love and commitment in the same way as their heterosexual friends and families. This bill is for the parents, families and friends of same-sex couples who want to joyfully share in those celebrations and who want to celebrate their own love without the shadow of knowing that people dear to them are unfairly prevented from doing the same. This bill is for the kids of same-sex couples: children living in families where they are wanted, loved and cared for; children who deserve to have their families treated like every other family. The best thing to ensure that children of same-sex couples will thrive is if they do not live beneath a cloud of judgement, assumption and the outright untruths that discrimination breeds.

This bill is for the people who have been forced to try to change by others and who have found that they cannot. And this bill is for those who will never benefit from it—for those for whom taking their own life was easier than being gay or lesbian. This bill is not a silver bullet for discrimination; there is no such thing. Nor is there a shortcut for the long journey that many still face, but it is a step on that journey. It is a step that says our parliaments do not sanction discrimination. It is a step that says the attitudes of intolerance that do so much harm to so many have no place in our Parliament or in our laws. Whether this bill succeeds or fails, I want every person who has struggled simply because of who they are, every person who has suffered simply for loving who they do, to know that there are people in the community who will not accept this discrimination, there are people in our parliaments who will not accept this discrimination, and that together we will not rest until this discrimination is removed for all couples in New South Wales and across Australia. I commend the bill to the House.