

**Submission
No 1083**

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: PFLAG NSW Inc (Parents & Friends of Lesbians & Gays)

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Submission to the Inquiry into Same Sex Marriage Law in New South Wales

On behalf of:

PFLAG NSW Inc.

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CONTENTS

The Inquiry into Same Sex Marriage Law in NSW – PFLAG’s Response	4
1. Why PFLAG Supports Marriage Equality	5
Same Sex Marriage and Human Rights	5
Failing to Allow Same Sex Marriage Perpetuates Discrimination and Negativity Towards Gay People	6
Only Marriage Confers Full Legal Equality	8
Our Perspective as Parents and Family Members	10
Marriage is Governed by Civil Law, Not Religious Law	15
Marriage is an Evolving Institution	15
Other Advantages of Same Sex Marriage	16
Local and International Trend Towards Legislation of Same Sex Marriages	17
2. Legal Issues Surrounding the Passing of Marriage Laws at a State level	18
Conclusion	21

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Date of Submission: 28 February 2013

Att: Niall Blair
Committee Chair
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Committee Members,

As PFLAG NSW Inc (Parents & Friends of Lesbians and Gays) we make this submission.

PFLAG is a peer support group consisting of the parents and friends of lesbians and gays. Our group started in Parramatta in 1995. We conduct monthly family meetings where parents – and often their gay children – come to talk and to listen. We have a library of books and DVDs which parents can use in helping to reach understanding and acceptance. We are all volunteers. We are not trained counsellors. We love and care for someone who is gay. We believe that being gay is not a choice; it is the way our sons

and daughters are born. We want all of our children to be seen as equal in the eyes of society.

We:

- Support families and friends of gay people who are coping with adversity in society.
- Seek to raise awareness, educate and promote understanding in the general community.
- Seek to end discrimination and gain equal rights for our GLBTI family members and the gay community at large by advocating to government on all levels.

THE INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW –

PFLAG’S RESPONSE

PFLAG welcomes the Inquiry into Same Sex Marriage Law in New South Wales (“the Inquiry”). In this submission, we will firstly set out the reasons why we are so strongly in favour of marriage equality. We will then comment on some of the legal issues that may arise from the passing of same sex marriage laws at a State level.

1. Why PFLAG Supports Marriage Equality

Same Sex Marriage and Human Rights

We believe that freedom of sexual orientation and gender identity are fundamental human rights. By not allowing same-sex couples the right to marry, Australia is denying them these rights, and is failing to comply with its international human rights obligations.

Australia is a party to the *International Covenant on Civil and Political Rights* (ICCPR). Article 26 of ICCPR provides that all people “are equal before the law and are entitled without any discrimination to the equal protection of the law.” It also prohibits all discrimination based on “any ground such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status.” Although there is no specific mention of sexuality or sexual orientation in Article 26, the phrase “other status” has been interpreted to include sexual orientation.¹ As a party to ICCPR, Australia has an obligation to put in place laws that give effect to the Convention. However, Australia’s existing marriage laws (the *Marriage Act, 1961* (Cth) limit the definition of marriage to the union of a man and a woman and prohibit the recognition of same-sex

¹ ESCR Committee, General Comment 18, (2005), [12(b)(i)], in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/I/Rev.8 (2006), 151. See also ESCR Committee, General Comment 14 (2000), [18], in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/I/Rev.8(2006), 91. See also *Toonen v Australia*, (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7].: *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, [10.4].

marriages that are conducted overseas. This clearly discriminates against people on the basis of their sexual orientation, and is therefore at odds with the Convention.

It is time for Australia to honour its human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) so that marriage is recognized as a union of two people, regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life.

As “The First State” it is appropriate that New South Wales initiate this process. Legalising same sex marriage would place New South Wales at the forefront of a groundbreaking and widely supported human rights law reform.

Failing to Allow Same Sex Marriage Perpetuates Discrimination and Negativity Towards Gay People

Not allowing same sex marriage discriminates against people on the basis of a characteristic over which they have no control – their sexual orientation. We believe that this is fundamentally unfair and unjust.

It is well accepted that same-sex attracted people are born that way. It is not a choice! Anecdotally so many of the gay people we have come to know have struggled with their sexual orientation and have often attempted suicide and often

succeeded. United States studies reveal that at least 30% of youth suicides are gay related. Most gay people tell how they feel excluded from “mainstream” society because (often from a young age) they feel “different”. They often suffer discrimination at school which results in very low self-esteem and depression. Family members of people involved in this submission suffered depression in their younger years. Another family member of people involved in this submission suicided because his family could not accept him due to societal attitudes. He wanted so much to marry his partner and settle down. The combination of all this negativity drove him to engage in substance abuse and he finally suicided. At PFLAG we have found this to be a common theme.

Marriage is a valued, respected and universally recognized institution. Excluding same-sex couples from this institution devalues them and their relationships and sends a message that it is okay to discriminate against gay people in other areas of life.

Allowing same sex couples to marry gives:

- First and foremost, recognition that same-sex people are not second class citizens, but are absolutely equal to their heterosexual counterparts.
- Instant recognition of their union within society.

- The official celebration of their union.
- Automatic respect that comes with marriage.
- Recognition of next of kin.
- Same-sex attracted people the opportunity to plan a future life together.
- A secure and stable environment for any children. Please recognize that many gay couples are having children or are co-parenting children.
- A sense that their relationship is equal, valid, valuable and worthwhile.

Only Marriage Confers Full Legal Equality

Law reform in recent years has led to there being greater legal equality between same-sex and heterosexual couples. For example, same-sex relationships have been brought within the meaning of de facto relationships by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

However, there are still some areas where same-sex couples are treated differently. Unlike married couples, de-facto partners are required to produce a

range of evidence to prove that their relationship exists in order to get access to certain legal entitlements. This evidence may include the length of the relationship, living and financial arrangements and whether a sexual relationship exists. Many couples find it intrusive to have to provide this evidence. It may also be difficult to satisfy these requirements where couples have only recently met, if they have to live apart because of work or if they have just moved from another country.

We also note that there are now other ways that same-sex relationships in Australia can be legally recognised, such as relationship registration systems (in NSW, Tasmania and Victoria) and civil unions in the ACT. These have the advantage of making it easier for a couple to “prove” their relationship. However, we believe that they offer an inferior form of legal recognition to marriage. This is partly, but importantly, because they are not recognised in many overseas countries. In contrast, marriage is a “portable” legal contract. A marriage in one country is recognised in most other countries.

While civil unions allow for greater ceremony and symbolic recognition of a same-sex relationship than registration schemes, we do not believe that they are a satisfactory alternative to marriage. They are not understood in the same way as marriage by families, friends and society in general. We are also concerned that having a two tier system (marriage and civil unions) simply entrenches stereotypes about gay people being “different” and their relationships being less

legitimate than heterosexual ones. PFLAG believes that the only way to prevent this is to make marriage available to both same-sex and heterosexual couples.

Our Perspective as Parents and Family Members

It is important to recognize that all gay people have families. Marriage equality is an issue that affects not only any gay couple, but also their immediate and extended families and their friends. It is well recognized that at least 10% of the population is same-sex attracted. Therefore, taking their families and friends into account, this issue affects at least one fifth of Australia's population.

Many of us come from families where there are both heterosexual and same sex attracted children. For us, all our children are equal and should be treated as such by the law. When our gay children and their partners come to visit, they are treated exactly the same way as their married heterosexual siblings and their partners. Their union is respected and we believe it is appropriate for society to be given the opportunity to respect it as well. Here are some stories from parents:

From Pam and Arthur:

“We have 2 children, 1 straight daughter, 1 gay son. Our son showed exceptional talent at school during infants and primary. He first experienced homophobia in year 5 with kids calling him derogatory names. In year 6 he was made school captain and the homophobia abated to a large extent. In year 7, the homophobia

started in earnest, manifesting in verbal attacks and physical attacks on him whilst he was walking to and from school.. He also experienced his schoolbag being upended and the culprits running off with his possessions. In year 8 he was hit on the head with a chair.

A change of high schools brought no relief. He was attacked on the bus and the police were called to our home twice. He despaired in the face of all this bullying. His school work and his self esteem suffered badly and he left school at the end of year 10, being totally unable to tolerate the abuse any longer. We discovered homophobic messages were written on our letter box.

Our son left home to live in the city before the age of 18, where he found alcohol and drugs eased the pain of abuse.

He returned home in 2003 when he had a total breakdown, wanting to suicide. He was totally unable to leave the house for a year.

He went to TAFE and did a Graphic Design course. At the end of the course he won every prize. However, when he entered the workforce, he was unable to last longer than about 3 months in any job. At about the 3 month point, he would have a breakdown and would have to leave.

He is being treated by a GP, a social worker and a psychiatrist.

We believe his life experiences from late primary school onwards have resulted in him being totally unable to sustain any meaningful relationships, although he would dearly love to meet someone special and settle down.”

From Rosa:

“My husband and I migrated from Argentina many years ago. We chose to come to Australia because we believed life here would offer us and our children wonderful opportunities which would not have been available to them in Argentina. We love Australia and have totally embraced life here with our family. We have 2 heterosexual, married children who have families. We have a lesbian daughter in a long term relationship. She and her partner have 2 little boys. They would love to be married. We would love to see them married. We believe they should have this right, just as our heterosexual children have, to raise their family in a socially and legally recognised stable and secure environment. It is ironic that they would have been able to get married in Argentina!”

From Ruth & Ron:

“We have 2 sons. Both our children have the same parents, were brought up in the same loving family environment, attended the same Sunday School, infants, primary and Christian high school. Our sons were both encouraged to participate in neighbourhood and school sporting teams and activities. They are now grown men, employed in very responsible careers in finance and investment, and biomedical science. One son can legally marry the person he loves and

wants a life relationship with. However, unfortunately, our other son is prohibited from legally marrying the person he loves and wants a lifetime relationship with because he was born homosexual. Under Australian law he is prohibited from this choice.

To have the legal choice to marry the person you love is a basic human right and is recognised as such in many other Commonwealth countries. Australian marriage laws were changed to take this human right from our gay son and many other Australians.

Australian marriage laws are cruel and discriminatory.”

From Anne and Ray:

“We have four children. The youngest (aged 16) is gay. When he “came out” at the age of 14, some people said to us: ‘Don’t worry, he might change – he’s still young.’ However, we both knew that his sexuality was one thing he would not, and could not, change. It was something he had no control over – he was simply born that way.

We also know that there is not a single thing that we would change about our son. He is a happy, confident kid with many friends. He is intelligent, compassionate and creative. We are very proud of him.

However, lately he has started to tell us that he finds it hard to understand why he, unlike his siblings, will not be able to get married when he is older. He has started to say that he worries about his future, and that he does not like being seen as 'not as good as' everyone else.

We worry about his future too. We hope that by contributing to this submission, we are demonstrating to our son (and also to all other gay and lesbian people in Australia) that we believe that they are just 'as good as' everyone else, and that their relationships should be able to be recognized and celebrated through the institution of marriage."

As parents we believe our same sex attracted sons and daughters have the right to marry because:

- They pay taxes and mortgages, as do their families.
- They contribute equally to society with their talents.
- They give back to society, in particular by fostering children. It is recognised – particularly by Barnardos – that same-sex attracted couples make excellent, stable parents for foster children. They are, in fact, sought after in this capacity.

- We want to see them celebrate their union in the same way as their heterosexual siblings.
- It is completely inappropriate to discriminate against them on the grounds of their sexual orientation. They have no control over this.

Marriage is Governed by Civil Law, Not Religious Law

We believe we live in a secular society. Church and State are separate entities. We fully respect the Church's right to choose non-involvement in any of these unions. We believe marriage means the union of two people, regardless of their sex, sexuality or gender identity, voluntarily entered into for life.

Marriage is an Evolving Institution

Marriage is constantly evolving, and over the years the law has changed in order to reflect this. A few examples of where appropriate changes have taken place:

- Indigenous Australians no longer have to seek permission to marry.
- Inter-racial marriages are no longer frowned upon. Nor are "mixed" marriages (different religions).

- Married women are no longer treated as “chattels” with little or no rights.

Polls within Australia indicate that approximately 62% of the population is now in favour of same-sex marriage. We see no reason why the law should not now change to reflect the way that most Australians now see marriage – as an inclusive institution, rather than an institution that excludes people simply because of their sexual orientation.

Other Advantages of Same-Sex Marriage

PFLAG NSW Inc. receives many marketing details from the wedding industry, offering services to same-sex couples. We are also aware of a number of celebrants happily offering their services for such ceremonies.

We believe that with more people wanting to get married, it is evidence of the fact that marriage is held in high esteem. We are at a loss to understand how some married people seem to think that gay marriage will diminish their own marriage. We would have thought quite to the contrary.

Local and International Trend Towards Legislation of Same-Sex Marriages

We draw your attention to the many Christian/Catholic countries around the world that have implemented same sex marriage, such as Argentina, Spain, Portugal and Mexico with no negative impacts. Commonwealth countries such as Canada and South Africa have also introduced same-sex marriage, as have several states in the United States. Recently same sex marriage passed in the French Lower House.

Most notably, recently same-sex marriage was passed in the United Kingdom under the leadership of Conservative Prime Minister David Cameron, who said “I am a strong believer in marriage. It helps people commit to each other and I think it is right that gay people should be able to get married too. This is, yes, about equality, but it also about making our society stronger”.

Locally, the Mayor of Byron Bay Council, Mayor Simon Richardson, wants to “lead the way” for marriage equality in Australia, giving consideration to producing symbolic certificates to be conferred at ceremonies for gay couples. He says he wants residents to be validated by the gesture. “Even though within Byron it might be a bit token, at least within Byron we will acknowledge your wedding, we acknowledge your marriage, we acknowledge your partnership”.

2. Legal issues surrounding the passing of marriage laws at a State level

PFLAG supports the issue of same-sex marriage being approached as a State law issue. While our preference would be for a national-wide recognition of same-sex marriage through federal legislation, we believe that this is unlikely to happen in the current political climate. Unlike other democracies, Australia does not have a national Bill of Rights and we understand that this makes it difficult for courts to bring about change in this area. Therefore it seems to us that the States are now the most appropriate forum where the issue of same-sex marriage can be debated and law reform initiated.

While we are not constitutional law experts, we understand that the power to make laws with regard to marriage is not a power that is exclusive to the Commonwealth. Section 51(xxi) of the Australian Constitution makes it very clear that marriage is a topic where the Federal Parliament holds power concurrently with the States.

The NSW Parliament has power under the *Constitution Act, 1902* (NSW) to make laws “for the peace, welfare and good government” of the State. There is no limitation on this power that would stop New South Wales legislating with regard to same-sex marriage.

We understand there is a chance that a State law permitting same-sex marriage could be made inoperative if it was inconsistent with the federal *Marriage Act 1961*. However, we understand that there are strong legal arguments in favour of there being no inconsistency as well as arguments that the Commonwealth may not in fact have the power to legislate for same-sex marriage at all.²

We acknowledge that it is possible that a High Court challenge could be made against a NSW same-sex marriage law. However, this does not justify a failure to pass such a law in the first place. Legislators have a responsibility to pass laws that respond to needs within the community, not to second guess the judiciary. Many laws are passed in circumstances where they may be subject to challenge.

The legal costs to New South Wales of having to defend a High Court challenge would be offset by the many benefits that would accrue to the State if same-sex marriage is allowed, including economic boosts to small businesses in the wedding industry and tourism industries, not to mention the kudos that New South Wales would derive from being the first legislature in Australia to introduce same-sex marriage.

In our view, a challenge is unlikely, given the groundswell of public opinion in favour of same sex marriage. We believe that it is more likely that legislation for same sex marriage in New South Wales would trigger similar reforms in other

² Professor George Williams, *Can Tasmania Legislate for Same-Sex Marriage?* *The University of Tasmania Law Review*, Vol 31, No 2 2012, pp 117 – 133.

states and provide an impetus for the passing of a same sex marriage law. We note that this seems to be the current trend in the United States.

It would be a tragedy if same sex marriage laws were not passed in New South Wales due to misguided, ill informed concern about the constitutionality of such laws. Our gay sons and daughters, family members and friends deserve better than this. On a daily basis, we see the impact on them of homophobia and discrimination. We believe that legislation permitting them to marry would help to eradicate this as it would finally place them on an equal footing with the rest of society. We urge the NSW Parliament not to take a timid approach to this issue, but rather to step out boldly and implement a long over-due and momentous human rights reform in Australia.

Inevitably, some marriages break down so it is important that any same-sex marriage laws passed in New South Wales deal with the rights of parties married under such a law upon dissolution of marriage. We note that the consultation draft of the New South Wales State Marriage Equality Bill 2013 (the Bill”) which has been prepared by the NSW cross party working group for marriage equality appears to address this issue comprehensively and we support its provisions.

However, we are concerned that the Bill has a residency requirement that would appear to stop most couples from interstate getting married in New South Wales. We are not aware of a similar requirement for “straight” couples, and are

concerned that this imposes an element of discrimination. We think this is inappropriate in a federation like Australia and ask the Committee to recommend that the residency requirement be removed.

CONCLUSION

Being married provides our same-sex attracted children all the same opportunities as our heterosexual children to make choices, mistakes and actions.

In conclusion, marriage equality will take away the feeling from our same-sex attracted sons and daughters that they are perceived to be second class citizens with second class relationships. They will receive the same rights, privileges, responsibilities and choices as their siblings and society generally – that being to have their relationships recognised and equally celebrated.

Yours sincerely,

Judith Annette Brown, Ray Brown, Narelle Phipps and Anne Mainbridge

President, Publicity Officer, Secretary and Committee Member of PFLAG NSW Inc.