Standing Committee on Social Issues

Same-sex marriage law in New South Wales

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Terms of reference

1. Any legal issues surrounding the passing of marriage laws at a State level, including but not limited to:
    a. the impact of interaction of such law with the Commonwealth Marriage Act 1961
    b. the rights of any party married under such a law in other States' and Federal jurisdiction
    c. the rights of the parties married under such a law upon dissolution of the marriage;
2. The response of other jurisdictions both in Australia and overseas to demands for marriage equality;
3. Any alternative models of legislation including civil unions; and
4. Changes in social attitudes (if any) to marriage in Australia.
5. That the Committee report by Friday 26 July 2013.[1]

These terms of reference were referred to the Committee by the Premier of New South Wales, the Hon Barry O'Farrell MP, and were adopted by the Committee on 6 December 2012.

[1] *LC Minutes* (19/02/2012) 123, Item 33, p 1458.

Committee membership

The Hon Niall Blair MLC	The Nationals	*Chair*
The Hon Helen Westwood MLC	Australian Labor Party	*Deputy Chair*
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Chair's foreword

I am pleased to present the Report of the Standing Committee on Social Issues Inquiry into Same-Sex Marriage Law in New South Wales.

This Inquiry has generated a public response greater than any other previously received by a committee of the Legislative Council. That response was characterised by moral and belief-based opinions about sexual orientation and the fundamental meaning of marriage. This Report does not pass judgment on the merits of same-sex marriage. It aims instead to inform public debate by providing a platform for the contrasting voices in our community coupled with a measured account of the legal issues to which a possible New South Wales same-sex marriage law gives rise.

It became apparent over the course of the Inquiry that the legal issues associated with such a law have been widely misunderstood in some key respects. This Report seeks to clarify the law, including in particular the question as to whether New South Wales can legislate on the topic of same-sex marriage; there is no doubt that it can. The broader and more vexed question is of course whether it should. Ultimately that question is one to be answered by the elected representatives of the people of New South Wales and it is my sincere hope that this Report helps to inform that debate.

I would like to thank the many contributors to this Inquiry, including my colleagues on the Committee. I convey my particular gratitude to the legal academics for sharing their expertise and briefing the Committee on complex areas of constitutional and family law.

Finally, I express my heartfelt thanks to those members of the New South Wales community who wrote and tendered submissions, especially the large number of people participating in a committee inquiry for the first time. I respect that for many participants this Inquiry is not just about a law or a social institution but about matters that are inherently personal.

I commend this Report to the Government.

The Hon Niall Blair MLC
Committee Chair

Executive summary

This Inquiry considered a range of issues associated with a possible New South Wales law for same-sex marriage. The Inquiry generated substantial public interest with a record number of submissions received for a Committee of the New South Wales Legislative Council. Much of the evidence focused on the merits of the case for same-sex marriage rather than the operation of the law itself. Stakeholder views were often polarised and expressed strongly held personal and religious beliefs about marriage. The Committee also heard detailed evidence about the law from a number of experts. The two key legal questions were whether the New South Wales Parliament could legislate on the subject of marriage and, if it did, whether a law for same-sex marriage would be operative.

The Committee reached the conclusion that the New South Wales Parliament has the power to legislate on the topic of marriage, including same-sex marriage. However, if New South Wales chooses to exercise that power and enact a law for same-sex marriage, the law could be subject to challenge in the High Court of Australia. The outcome of such a case is uncertain and therefore equal marriage rights for all Australians may best be achieved under Commonwealth legislation.

Chapter 1 – Introduction

This Chapter provides background to the Inquiry. It describes the Inquiry process and the structure of the Report.

The terms of reference for the Inquiry were referred to the Legislative Council's Standing Committee on Social Issues by the Premier of New South Wales, the Hon Barry O'Farrell MP, on 29 November 2013. The Committee received 7,586 responses to its Inquiry, all of which have been tabled in the House along with this Report. 1257 submissions were also published on the Committee's website. Public hearings were held on 6 and 15 March 2013, transcripts of which and other documents associated with the inquiry are available on the Committee's website: www.parliament.nsw.gov.au/samesexmarriage.

Chapter 2 – Regulation of same-sex relationships in other jurisdictions

In Chapter 2 the Committee describes the response of other jurisdictions in Australia and overseas to demands for same-sex marriage. Currently no Australian jurisdictions provide for same-sex marriage, rather legal recognition of same-sex relationships occurs through other legal mechanisms such as relationship registration, civil partnerships and recognition of de facto status.

Several countries have recently enacted same-sex marriage laws. The Committee describes in more detail the approaches taken in New Zealand, Canada, the United Kingdom and the United States. Although these legal systems are not precisely analogous with New South Wales, each has recently considered same-sex marriage law in a comparable cultural and political context.

Chapter 3 – Relationship recognition in New South Wales law

In Chapter 3, the Committee turns its attention to the law in New South Wales and describes existing forms of relationship recognition for same-sex couples who reside here. It also canvasses stakeholder views on whether those arrangements are adequate and whether civil unions might be a preferable alternative.

Same-sex couples in New South Wales have legal rights in respect of the relationship recognised either through attainment of de facto status or through registering their relationship. The New South Wales Parliament has referred to the Commonwealth the power to regulate matters arising from the dissolution of de facto and registered relationships.

There were divergent views as to whether existing legal arrangements for legal recognition of same-sex relationships in New South Wales were adequate. Some stakeholders felt that the status quo already provides same-sex couples with substantially the same rights as married couples and on this basis saw no need for changes to the law. Others felt that de facto or registered relationships are an inferior form of relationship recognition when compared with marriage and argued that same-sex couples should be allowed to marry.

The Committee found that there was little community support for civil unions. In general, those opposed to same-sex marriage were concerned that civil unions would be a step towards same-sex marriage. Whereas advocates for same-sex marriage contended that civil unions added little to existing legal arrangements and lacked the symbolic significance of marriage.

Chapter 4 – Social attitudes to marriage

Chapter 4 canvasses social attitudes to marriage and stakeholder views about what marriage means. Inquiry participants paid much attention to the historical, religious and symbolic meaning of the word. It was strongly argued by a number of individuals and organisations that the fundamental meaning of marriage is a union between a man and a woman, to the exclusion of all others, for the purpose of procreation. Others felt that the meaning of marriage was personal to each individual and not necessarily about biology or procreation.

In this Chapter, the Committee acknowledges that for some people the word 'marriage' holds particular religious significance and that allowing same-sex couples to marry would run contrary to what marriage means to them. Indeed, there was a concern among those of this view that to permit same-sex marriage would undermine the institution of marriage. Other participants argued that same-sex marriage would have little impact on people it does not directly affect, and would have positive mental health consequences for gay and lesbian people by promoting acceptance and decreasing discrimination.

The social meaning of marriage has changed over time and so too have social attitudes towards gay and lesbian relationships. The Committee acknowledges that the social and legal meanings of words are often symbiotic and changes to the law can send a message to the community about acceptable and unacceptable behaviour and about legitimacy and acceptance.

Chapter 5 – Individual legal rights and marriage

A large number of submission-makers drew upon rights-based arguments in providing their views to the Committee. In this Chapter the Committee canvasses these views and notes the importance of balancing rights to non-discrimination and equality with the right to religious freedom.

Proponents of same-sex marriage commonly argued that the status quo was discriminatory and violated the human rights of equality and non-discrimination. Other stakeholders defended the status quo arguing that the law was not discriminatory on the basis of sex because anyone can choose to marry someone of the opposite sex, and questioned how far non-discrimination arguments might be taken.

The Committee recognises the distinction between marriage as a religious sacrament and marriage as a civil institution and expresses the view that the law should be non-discriminatory in its operation. The Committee notes that recent amendments to the Commonwealth *Sex Discrimination Act 1984* prohibit discrimination on the basis of sexual orientation. However, there is an exemption for anything done in accordance with the Commonwealth *Marriage Act 1961* (hereafter 'the Marriage Act'). In the Committee's view this exemption effectively acknowledges that the current operation of the Marriage Act is discriminatory.

Many of those who objected to same-sex marriage were concerned that rights to religious freedom would be eroded with the passage of a same-sex marriage law. If a same-sex marriage law was passed, the Committee sees merit in an approach that would exempt celebrants and ministers of religion from solemnising same-sex marriages if to do so would contradict their personal or religious beliefs.

Chapter 6 – Can New South Wales legislate for same-sex marriage?

This Chapter documents legal arguments about whether New South Wales can legislate for same-sex marriage and whether that law would be operative. These are two distinct questions that are considered separately. In relation to whether New South Wales can legislate for same-sex marriage, many submission-makers asserted that only the Federal Parliament has the power to legislate in respect of marriage. The Committee has found this to be an error of fact. There is no doubt that the New South Wales Parliament can legislate on the subject of marriage, including same-sex marriage. However, in relation to whether such a law would be operative, the Committee also found that should New South Wales choose to enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia.

If a High Court challenge to a New South Wales same-sex marriage law was mounted, the most likely legal argument would be that the state-based same-sex marriage law conflicts with the Commonwealth Marriage Act. Section 109 of the Australian Constitution provides that where a state and Commonwealth law conflict, the Commonwealth law will prevail, and the state law shall, to the extent of the inconsistency, be invalid.[2] Only the High Court of Australia can determine whether a state law is inconsistent with a Commonwealth one. The High Court could find a New South Wales same-sex marriage law to be inoperative in whole or in part on the basis of inconsistency, or it could find the law operative in its entirety.

[2] Although the Constitution uses the word 'invalid', in fact a state law that was found to be inconsistent with a Commonwealth law would actually be *inoperative* until such time as the inconsistency ended (for example where the Commonwealth law is repealed).

There is nothing to prevent the NSW Parliament passing legislation that might, or might not, be inconsistent with Commonwealth law. There is precedent for this and indeed, it is not possible to guarantee the constitutional validity of any state law prior to its enactment. The High Court can confirm the validity of a law only after it has been passed by the Parliament. This would occur when that legislation is challenged by someone with standing to do so or when a declaration of validity is sought.

In relation to the constitutional validity of a possible New South Wales same-sex marriage law, the Committee holds considerable concern for the rights of couples who might rely on a law that is later determined to be inoperative. It is foreseeable that if a law to provide for same-sex marriage in New South Wales was enacted, couples might marry under that law prior to a High Court challenge. If the legislation was later determined to be inoperative those couples could be left with uncertain legal rights. With this in mind, the Committee considers that if a law to provide for same-sex marriage in New South Wales is passed, the NSW Government should ensure that the legal rights of couples who rely on that law are protected in the event that the law or part thereof, fails to survive constitutional challenge.

The question of constitutional inconsistency is complex. There are sound arguments both ways about whether a state-based same-sex marriage law would survive constitutional challenge. The Committee finds in this Chapter that equal marriage rights for all Australians may best be achieved under Commonwealth legislation.

Chapter 7 – The operation and content of a New South Wales same-sex marriage law

The final chapter of the Report considers the content of a potential same-sex marriage law. It outlines matters related to the interaction of a New South Wales same-sex marriage law with law in other Australian jurisdictions and how the dissolution of a same-sex marriage might be governed. The Committee did not receive a great deal of evidence about how rights conferred under a same-sex marriage law could be recognised in other Australian jurisdictions and relies on the advice of the few legal experts who commented on this aspect of the Inquiry. It has not been possible for the Committee to have considered the gamut of legal complexities that could arise. This Chapter therefore canvasses but a few of the most prominent legal issues.

The Committee is cognisant that the law must often deal with complex matters including, quite frequently, questions about how a state law will interact with the law of other Australian jurisdictions. On the question of interoperability of a New South Wales law for same-sex marriage with law in other Australian jurisdictions, the Committee notes that the legal issues are complex. Because of these complexities, the Committee reiterates its finding that it is of the view that equal marriage rights may best be achieved under Commonwealth legislation.

Finding

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The Committee finds that:

1. The State of New South Wales has the constitutional power to legislate on the subject of marriage;
2. Should New South Wales choose to exercise this power and enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia;
3. If such a challenge occurs it is uncertain what the outcome of the case would be; and
4. Equal marriage rights for all Australians may best be achieved under Commonwealth legislation.

Chapter 1 Introduction

This Chapter provides an overview of the Inquiry process including the methods the Committee used to facilitate public participation. It also includes some background to the Inquiry and a brief outline of the Report's structure.

Background to the Inquiry

1.1 In May 2012, the NSW Legislative Council passed a motion in favour of 'marriage equality' by 22 votes to 16. As the year continued, members of both Houses of the New South Wales Parliament made statements for and against same-sex marriage. One of the principal objections raised by members was that New South Wales does not possess the constitutional authority to pass law granting same-sex couples the right to marry. Questions were also raised about how a possible New South Wales law would interact with related law in other Australian jurisdictions.

1.2 In this context, on 29 November 2012 the Premier of New South Wales, the Hon Barry O'Farrell MP, referred to the Legislative Council's Standing Committee on Social Issues (hereafter 'the Committee') an Inquiry on a possible same-sex marriage law in New South Wales. This Report constitutes the culmination of the Committee's work.

Conduct of the Inquiry

Submissions

1.3 The Committee advertised a call for submissions in the *Sydney Morning Herald* and *The Daily Telegraph* in January 2013. A media release announcing the Inquiry and the call for submissions was sent to all media outlets in New South Wales. The Committee also wrote to a large number of organisations and individuals inviting them to participate in the Inquiry. The closing date for submissions was Friday 1 March 2013.

1.4 The Committee received 7,586 responses to this Inquiry. This figure includes all pro forma and unique submissions, as well as signatures on petitions. The Committee notes that this constitutes the largest number of responses ever received by a New South Wales Legislative Council Parliamentary Committee inquiry to date.

1.5 It was beyond the capacity of the Committee secretariat to publish this number of submissions within the timeframe for the Inquiry. The Committee has published 1,257 submissions, including all submissions received from representative organisations. A list of these is contained in Appendix 1 and copies of these submissions are available on the Committee's website: www.parliament.nsw.gov.au/socialissues. The remaining submissions form part of the official record of the Committee's Inquiry and have been tabled in Parliament together with this Report.

Public hearings

1.6 The Committee held two public hearings at Parliament House on 6 and 15 March 2013. The first hearing focused on the legal issues pertaining to State-based same-sex marriage law at which the Committee heard detailed evidence from leading academics in constitutional and family law. The second day of hearings had a broader scope and canvassed social attitudes to marriage as well as some legal issues.

1.7 The Committee thanks all the individuals and organisations that made a submission or gave evidence during the Inquiry.

1.8 A list of witnesses who appeared at the hearings is reproduced at Appendix 2. The transcripts of all hearings are available on the Committee's website.

Structure of the Report

1.9 In line with the Committee's second term of reference, Chapter 2 of this Report describes approaches to same-sex marriage taken in other Australian jurisdictions and in comparable jurisdictions overseas. In recent months, several countries have legalised same-sex marriage or conducted public inquiries into the possibility of doing so.

1.10 Chapter 3 outlines the law governing relationship recognition for same-sex couples in New South Wales, including relationship registration and de facto status. It canvasses stakeholder views on existing legal arrangements and on civil unions as an alternative to marriage.

1.11 In Chapter 4 the Committee turns its attention to social attitudes to marriage in New South Wales. There was strong sentiment for and against same-sex marriage presented to the Committee and this Chapter canvasses these views.

1.12 Chapter 5 of this Report considers human rights arguments for and against same-sex marriage. Some stakeholders argued that denying same-sex couples the right to marry violates individual rights to equality and non-discrimination. Others argued that if same-sex marriage were legal it would erode religious freedoms and the institution of marriage.

1.13 Chapters 6 and 7 focus on domestic law. Chapter 6 explains some of the constitutional complexities to which the enactment of a same-sex marriage law in New South Wales gives rise. It answers the question of whether New South Wales can legislate and canvasses stakeholder views about whether such a law would be operative.

1.14 Chapter 7 discusses the operation and content of a possible same-sex marriage law including its interaction with law in other Australian jurisdictions and how the dissolution of a same-sex marriage might be governed.

Chapter 2 Regulation of same-sex relationships in other jurisdictions

This Chapter outlines how Australian jurisdictions and other parts of the world have regulated same-sex relationships. It canvasses public inquiries undertaken as well as legislation passed elsewhere. The Committee received mixed evidence as to the value of looking to overseas approaches in terms of informing a possible law in New South Wales. The unique constitutional landscape in Australia limits the utility of direct comparisons to some degree. Nevertheless, the issues that other jurisdictions have grappled with are similar and, in accordance with our terms of reference, the Committee describes these approaches in this Chapter.

Other Australian Jurisdictions

2.1 This section describes relationship recognition in other parts of Australia and the Commonwealth. Chapter 3 of this Report outlines the approach taken in New South Wales and stakeholder views on existing legal arrangements in this State.

Commonwealth

2.2 Marriage is regulated in Commonwealth law by the *Marriage Act 1961*. The Marriage Act defines marriage as the 'union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. Other relevant aspects of this legislation are described in Chapter 6.

2.3 Same-sex marriage has been the subject of numerous debates in the Australian Parliament for more than a decade. Legislation has been introduced to amend the definition of marriage to include same-sex couples without success. In 2008, amendments were made to other Commonwealth laws that had, until then, discriminated against same-sex couples and their children. These amendments were to dozens of pieces of legislation including those in relation to taxation, social security, employment, health, superannuation and family law.[3]

Commonwealth parliamentary inquiries into same-sex marriage

2.4 Both Houses of the Australian Parliament have undertaken inquiries into law pertaining to same-sex marriage. As detailed below, the first of these inquiries considered a law to forbid same-sex marriage whereas the other inquiries considered law to permit same-sex marriage. A common feature of all of these inquiries was the volume of public interest they generated, with tens of thousands of submissions received.

2.5 On 23 June 2004, the Senate referred the Marriage Legislation Amendment Bill 2004 to the Senate Committee on Legal and Constitutional Affairs for inquiry and report. This was the first of three Senate inquiries into law relating to same-sex marriage. The bill proposed three principal amendments to the Marriage Act to ensure that same-sex unions could not be

[3] Same Sex: Same Entitlements, Australian Human Rights Commission, accessed 25 July 2013 <www.humanrights.gov.au/same-sex-same-entitlements>.

equated with marriage.[4] Firstly, it sought to amend the Marriage Act to provide a legislative definition of marriage: 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[5] Secondly, it sought to forbid domestic recognition of same-sex marriages solemnised overseas. The third amendment was to the *Family Law Act 1975* (Cth) and would prevent inter-country adoption by same-sex couples in Australia.[6]

2.6 In advance of a forthcoming election, and before the Inquiry's conclusion, in August 2004 a separate bill was introduced into the Commonwealth Parliament proposing the first two amendments. That bill was passed by the Parliament with the support of all the major political parties and the Marriage Act was amended accordingly. The passage of the amendment through Parliament effectively overtook the Committee's Inquiry except in respect of inter-country adoption. However, on the basis that the Governor-General had prorogued the Parliament in any case, the Committee elected not to continue its Inquiry.[7]

2.7 The second Senate Committee on Legal and Constitutional Affairs Inquiry was established in June 2009. It was the first of two inquiries to look at bills to provide for same-sex marriage. The 2009 bill was identical to one considered in 2012 (discussed below) other than some differences in the proposed definition of the word 'marriage'. In its Final Report, the Committee recommended that the bill not be passed and that the Government review, through the Australian Law Reform Commission or another appropriate body, the establishment of a nationally consistent framework for recognition of same-sex relationships.[8] This recommendation was not adopted by the Government and in February 2010 the Senate voted on the bill and it was defeated.

2.8 The most recent Senate Inquiry was undertaken in 2012. On 8 February 2012 a private senator's bill on same-sex marriage was again referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The key provision of the bill would have repealed the definition of marriage inserted into the Marriage Act in 2004 and replace it with the words 'the union of two people regardless of their sex, sexual orientation or gender identity, to the exclusion of all others, voluntarily entered into for life'.[9] After conducting one of the largest inquiries in the history of the Australian Parliament, the Committee recommended amendments to the Marriage Act that would permit same-sex couples to marry.[10]

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4 Explanatory Memorandum to the [first] Marriage Legislation Amendment Bill 2004, p 2; referred to in the Senate Standing Committee on Legal and Constitutional Affairs, *Marriage Equality Amendment Bill 2010,* June 2012, p 4.

5 That definition was drawn from the words of Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 [UK Courts of Probate and Divorce].

6 Marriage Legislation Amendment Bill 2004 (Cth) Schs 1-2.

7 Correspondence from Senator Marise Payne, Chair of the Senate Legal and Constitutional Affairs Committee to Senator the Hon Paul Calvert, President of the Senate, advising that the Committee had not resolved to continue its Inquiry into the adoption aspect of the bill, 6 September 2004, p 2.

8 The Committee also recommended that the Department of Foreign Affairs and Trade issue certificates of 'non-impediment' to couples of the same sex on the basis as they do for heterosexual couples. This recommendation was adopted by the Commonwealth in 2012, thus allowing same-sex couples to wed overseas.

9 Marriage Equality Amendment Bill 2010 (Cth) Sch 1.

10 The Senate, Legal and Constitutional Affairs Committee, *Marriage Equality Amendment Bill 2010,* June 2012, p ix.

2.9 At the same time, the House of Representatives was conducting its own inquiry. Eight days after the 2012 Inquiry was referred to the Senate Legal and Constitutional Affairs Committee, a separate inquiry was referred to House of Representatives Standing Committee on Social Policy and Legal Affairs. This was a single inquiry on two separate bills: the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012. The report focused exclusively on the intent and content of the bills and did not comment on whether same-sex marriage was a worthwhile endeavour in itself. The Committee's 'Advisory Report' was tabled on 18 June 2012 and concluded that it was not an inquiry to examine the merits of same-sex marriage: something which, in that Committee's view, was more appropriately left to the Parliament:

> This was an inquiry held to examine legal and social issues relating to the two bills, and the effectiveness of each bill in achieving its stated purpose. It was not an inquiry to determine the merits of same-sex marriage. It is for the Parliament to determine the passage of the bill and this report aims to inform the Parliament in its debate on the text and outcome of each bill.[11]

2.10 During a debate that spanned several days, Senators made ardent and diverse arguments both for and against same-sex marriage.[12] A number of Senators mentioned that not all political parties were permitted a conscience vote,[13] contrary to the first recommendation of the Senate Committee's 2012 Report. On 20 September 2012 the Australian Senate voted against the second reading of the Marriage Equality Amendment Bill 2010 by 41 votes to 26.

2.11 On 20 June 2013, a bill to recognise overseas same-sex marriages solemnised overseas was defeated 44 votes to 28 in the Senate. The proposed amendment came shortly after New Zealand enacted law to recognise same-sex marriage and in the context of reports that a number of Australian same-sex couples planned to travel to New Zealand to wed.[14]

The Australian Capital Territory

2.12 The Australian Capital Territory enacted the *Domestic Relationships Act 1994* to govern property rights between unmarried spouses in domestic relationships in the ACT.

2.13 In 2006, the ACT passed law to provide for civil unions between same-sex couples. However, this legislation was overruled by the Commonwealth Government pursuant to its constitutional power to disallow territorial legislation. Professor Lindell observed that the ACT legislation was struck down on policy grounds but that it was not clear whether the legislation was inconsistent with the Commonwealth Marriage Act:

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11 The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012) p 49.

12 Marriage Amendment Bill (No.2) 2012.

13 Australian Senate Debates, 17 September 2012, Senator Brandis, p 6979; Senator Pratt, p 6983; Senator Back, p 6986; Australian Senate Debates, 18 September 2012, Senator Di Natale, p 7237; Australian Senate Debates, 19 September 2012, Senatory Bilyk, p 7314, Senator Waters, p 7321, Senator Wong, p 7328, Senator Di Natale, p 7414, Senator Milne, pp 7419-7421; Australian Senate Debates, 20 September 2012, Senator Humphries, pp 7450-7451, Senator Carr, p 7459, Senator Evans, p 7463, Senator MacDonald, p 7463, Senator Farrell, p 7468.

14 Australian Senate Debates, 20 June 2013, Senator Hanson-Young, p 1.

> The reason why similar attempts were defeated in the ACT related to the then ability of the Federal Government to disallow ACT legislation essentially on wider policy grounds although I am aware that one of the reasons it gave related to its assertion that the legislation involved was inconsistent with the Marriage Act as amended in 2004. … I am not aware of the Government's view being or having to be judicially tested since the power to disallow the legislation was not conditioned on any legal inconsistency.[15]

2.14 On 8 December 2011, the Hon Simon Corbell, ACT Attorney-General, introduced 'a bill to provide legal recognition equal to marriage under territory law for couples who are not able to marry under the Commonwealth Marriage Act 1961'.[16] That bill was enacted into law in August 2012 and the *Civil Unions Act 2012* (ACT) came into operation in September that year. The Act recognises that civil union is different to marriage but is treated under territory law in the same way as marriage.[17]

The Northern Territory

2.15 The Northern Territory has not sought to pass same-sex marriage law and does not have a system of relationship registration. Legal recognition of same-sex couples is afforded through recognition of de facto status. Similar to other states, the *De Facto Relationships Act 1991* (NT) provides that de facto status is available where two people are in a 'marriage like relationship', regardless of the sex of the partners. As in other jurisdictions, to determine whether a couple is de facto a court will consider, among other things, the length of the relationship, whether and for how long they lived together and whether a sexual relationship exists.[18]

Queensland

2.16 On 30 November 2011 the Queensland State Parliament enacted into law its *Civil Partnerships Act 2011* by 47 votes to 40 after a Committee Report into the bill recommended its passage.[19] The Act permitted any adult couple, regardless of sex, to enter into a civil partnership and provided for couples to hold a ceremony prior to registration if they wish.[20] In effect, the legislation provided that couples in a civil partnership enjoy equivalent legal rights to de facto couples without having to prove de facto status.

2.17 After the change of Government in Queensland in 2012, a bill was passed to amend the *Civil Partnerships Act 2011* and rename it the *Relationships Act 2011*. The amendments established a system of 'registered relationships' rather than 'civil partnerships' and removed the possibility

15 Answers to supplementary questions 6 March 2013, Professor Lindell AM, Question 5, p 4.

16 Australian Capital Territory Legislative Assembly Debates, 8 December 2011, p 5912.

17 Civil unions, ACT Government, accessed 12 July 2013 <www.ors.act.gov.au/community/civil_unions>.

18 *De Facto Relationships Act 1991* (NT) s 3A.

19 Queensland Parliament Legal Affairs, Police, Corrective Services and Emergency Services Committee, *Civil Partnerships Bill 2011,* Report 7, November 2011.

20 *Civil Partnerships Bill 2011 Explanatory Notes* (QLD), 2011, pp 1-2

of having a ceremony as part of the registration process.[21] Queensland has not sought to introduce legislation for same-sex marriage.

South Australia

2.18 The South Australian Parliament first considered a bill to provide for same-sex civil unions in 2003 but it failed to pass through Parliament. Relationship recognition for same-sex couples was granted through the enactment of the *Statutes Amendment (Domestic Partners) Act 2006* (SA). That legislation amended the *Family Relationships Act 1975* (SA) and various other Acts to provide for recognition of the close personal relationship between two adults regardless of their sex. In South Australia to be recognised as 'domestic partners' a couple must have lived together for at least three years.[22]

2.19 The South Australian *Domestic Partners Property Act 1996* provides for the resolution of property disputes between people in domestic relationships. That Act permits partners in 'close personal relationships', whether related or of the same gender, to enter into a 'domestic partnership agreement' about the division of property on termination of the relationship and any other matter related to the partnership.[23]

2.20 On 19 June 2013 the Upper House of the South Australian Parliament passed a motion congratulating New Zealand on its marriage equality law (discussed below at paragraphs 2.33-2.35). A private member's bill for an Act to permit same-sex marriage in South Australia was introduced into South Australia's Legislative Council on 15 February 2012. Second reading debates on the bill took place in March, May and October last year but the second reading motion was adjourned. At the time of writing the bill is yet to be considered further by the South Australian Parliament.

Tasmania

2.21 The Tasmanian *Relationships Act 2003* (Relationships Act) recognises a 'significant relationship' as one between two adults who are not married to one another or related by family. Where two people are in a 'significant relationship' recognised by the Relationships Act, if the relationship breaks down, the parties will be entitled to make certain financial and property claims.

2.22 For the purposes of legal recognition, couples can choose to register their 'significant relationship' (comparable to the New South Wales system of relationship registration). Alternatively, to be recognised as being in a 'significant relationship' couples can provide evidence of various matters including the duration of the relationship, that they live together, that a sexual relationship exists, that they are financial dependent or interdependent and any other relevant matter (similar to the New South Wales system of de facto recognition).

2.23 On 27 September 2012, the Tasmanian Legislative Council voted down a bill eight to six purporting to legislate for same sex marriage. The New South Wales State Parliamentary

21 *Civil Partnerships and Other Legislation Amendment Bill 2012 Explanatory Notes* (QLD), 2012, p 1.

22 *Family Relationships Act 1975* (SA) s 11A.

23 *Domestic Partners Property Act 1996* (SA) ss 3 and 5.

Marriage Equality Working Group suggested in its submission that during debate on the Tasmanian bill there was 'considerable confusion as to the implications of the passing of the Bill'.[24]

2.24 There is a notice of motion for Tuesday 20 August 2013 in the Tasmanian Parliament to restore the Same Sex Marriage Bill (2012) to the Notice Paper.

Victoria

2.25 Victoria does not have legislation for same-sex marriage but recognises relationships between same-sex couples through its *Relationships Act 2008*. That Act provides an alternative to marriage for same-sex or different-sex couples similar to the New South Wales system of relationship registration. Couples complete a form and return it to Births, Deaths and Marriages Victoria, either in person or by mail. To register a domestic relationship at least one partner in the relationship must be ordinarily resident in Victoria and both people must be over 18.[25]

2.26 On 6 June 2012 a bill to provide for same-sex marriage was introduced into the Victorian Legislative Council. The second reading motion was adjourned. At the time of writing the bill is yet to be considered further by the Victorian Parliament.

Western Australia

2.27 Relationship recognition for same-sex couples in Western Australia is derived from attainment of de facto status. Like other states and territories, de facto status arises where a couple lives together in a marriage-like relationship. Western Australia does not have a system of relationship registration or same-sex marriage.[26]

2.28 On 29 November 2012 a bill to provide for same-sex marriage was tabled in the Western Australian Legislative Council. The second reading motion was adjourned. At the time of writing the bill is yet to be considered further by the Western Australian Parliament.

Overseas approaches

2.29 At the time the Committee commenced its Inquiry, of the 196 countries in the world, 11 had made same-sex marriage legal. By the conclusion of this Inquiry four more had done the same. In the United States, 13 of 52 states have made same-sex marriage lawful.[27] The table below illustrates the jurisdictions in which same-sex marriage is now legal.

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24 Submission 521a, State Parliamentary Marriage Equality Working Group, p 7.

25 *Relationships Act 2008* (Vic) s 3; Births, Deaths and Marriages Victoria, *Register a Relationship*, accessed 12 July 2013 <www.bdm.vic.gov.au/home/relationships/register+a+relationship/>.

26 Legal Aid WA, *De Facto and Same-Sex Relationships,* accessed 9 July 2013 <www.legalaid.wa.gov.au/InformationAboutTheLaw/FamilyRelationships/Breakdown/Pages/DefactoSamesexRelationships.aspx>.

27 The figure '52' includes the District of Columbia and Puerto Rico which are a district and an unincorporated territory of the United States respectively.

Table 1 Overseas jurisdictions where same sex marriage has been made lawful as at 22 July 2013

Jurisdiction	Date of legislation
Netherlands	2001
Belgium	2003
The United States of America (Massachusetts, Iowa, New Hampshire, Vermont, Maryland, New York, Washington State, Washington DC)	2004 onwards
Spain	2005
Canada	2005
South Africa	2006
Norway	2009
Portugal	2009
Mexico (Mexico City)	2009
Iceland	2010
Argentina	2010
Brazil (Sao Paolo)[28]	2011 onwards
Denmark	2012
United Kingdom	2013
France	2013
New Zealand	2013
Uruguay[29]	2013

2.30 A theme within some submissions was that greater recognition of same-sex marriage overseas is illustrative of a global shift in perceptions of same-sex relationships.[30] Parents and Friends of Lesbians and Gays, for example, noted that a number of countries have introduced same-sex marriage laws:

> 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.[31]

2.31 On the other hand, the Committee was advised by other Inquiry participants that in terms of the legal questions to which this Inquiry gives rise, overseas approaches are not directly

28 In May 2013 media reports indicated that the Brazilian National Council of Justice (NCJ) (which oversees the Brazilian judiciary) determined that if a judge refuses to issue a certificate of marriage to a gay couple they could be subject to disciplinary proceedings, thus effectively permitting same-sex marriage across the country. However, the decision of the NCJ is subject to challenge in Brazil's Supreme Court: BBC News, 'Brazil Judicial Decision Paves the Way for Gay Marriage', accessed 12 July 2013 <www.bbc.co.uk/news/world-latin-america-22534552>.

29 BBC News, 'Uruguay Congress Approves Gay Marriage Bill', 11 April 2013, accessed 12 July 2013 <www.bbc.co.uk/news/world-latin-america-22102740>.

30 See eg, Submission 1120, ACON, p 5; Submission 1166, NSW Gay and Lesbian Rights Lobby, p 5; Submission 1220, Victorian Gay and Lesbian Rights Lobby, p 1; Submission 1253, Castan Centre for Human Rights Law, p 30; Submission 1257, Mr Christopher Puplick AM and Mr Larry Galbraith, pp 11-16.

31 Submission 1083, Parents and Friends of Lesbians and Gays, p 17.

comparable.[32] When asked whether there are examples of law overseas on which New South Wales might draw, Professor Williams advised the Committee that Australia's federal arrangements are sufficiently distinct that comparisons are better drawn domestically:

> The answer is no, unfortunately. That is because Australia's Federal arrangements are unique to us. The United States would be the closest. It has a range of states enacting same-sex marriage laws but that is because marriage, unlike here, has remained at the State level. You do not have the same Federal overlay. If we had not had the Federal law in 1961 we would still be dealing with different marriages around the country and it would not be an issue. No, I think if you were to look for analogies you would be looking to other fields within Australia where we have gone through issues of similar complexity, such as corporations law.[33]

2.32 Notwithstanding the disparities between our legal systems, in the following sections the Committee considers the approaches to same-sex marriage taken in New Zealand, Canada, the United States and the United Kingdom. Relevantly, these countries have each recently considered the issue of same-sex marriage law and have comparable cultural landscapes and systems of Government.

New Zealand

2.33 In April this year the New Zealand Parliament passed a bill to allow for same-sex marriage. In line with this legislation, New Zealand law now defines marriage as: 'the union of two people, regardless of their sex, sexual orientation, or gender identity'.[34]

2.34 The bill was scrutinised by the Parliament's Government Administration Committee, which tabled its Report in February this year.[35] The Committee recommended amending New Zealand's Marriage Act to permit same-sex couples to marry and to allow celebrants and ministers of religion the discretion not to solemnise marriages between same-sex couples if to do so would contravene their religious or philosophical beliefs.[36] Reflecting the Australian experience, the New Zealand Committee Inquiry received an unprecedented volume of public submissions: more than 21,000 in total, including a notable number from young people.[37]

2.35 The New Zealand Marriage (Definition of Marriage) Amendment Bill received royal assent on 19 April 2013[38] and will enter into force in August this year.[39] The delay in commencement is

32 Submission 623, Lawyers for the Preservation of the Definition of Marriage, pp 1 and 6; Professor George Williams AO, Professor of Law, University of New South Wales, Evidence, 6 March 2013, p 13.

33 Professor Williams, Evidence, 6 March 2013, p 13.

34 *Marriage (Definition of Marriage) Amendment Act 2013* [New Zealand] section 5.

35 New Zealand Parliament, Government Administration Committee, 'Report into the Marriage (Definition of Marriage) Amendment Bill', February 2013, pp 2, 6 and 9.

36 *Marriage (Definition of Marriage) Amendment Act 2013* [New Zealand] section 6.

37 New Zealand Parliament, Government Administration Committee, 'Report into the Marriage (Definition of Marriage) Amendment Bill', February 2013, pp 2, 6 and 9.

38 New Zealand Parliament, accessed 25 July 2013 <www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH_BILL11528_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm>.

in line with a recommendation of the Government Administration Committee that commencement be deferred for four months to allow the New Zealand Department of Internal Affairs to prepare for the law's implementation.[40] After it enters into force, the legislation will make consequential amendments to a number of other Acts including in relation to adoption, child support, property, and social security.[41]

Canada

2.36 Canadian courts have handed down three separate decisions which acted as a catalyst for a shift in Canadian law pertaining to same-sex marriage. The first of these was in July 2002. In that case the court determined that the prohibition of same-sex couples marrying was unconstitutional and in violation of the Canadian Charter of Rights and Freedoms. The following year, that decision was upheld by the Ontario Superior Court of Justice.

2.37 In 2003, the British Columbia Court of Appeal held that the prohibition on same-sex marriage violated the right to equality under the Charter. The court was careful to ensure that rights accrued through civil marriage did not contradict religious groups' right to refuse to solemnize same-sex marriages. The court also found that the definition of marriage as contained in the Canadian constitution was not immutable but responsive to social change.[42]

2.38 Later that year the Prime Minister of Canada announced that the Government would not appeal these decisions and that it intended to legislate to allow same-sex marriage. A bill was referred to the Supreme Court of Canada for an advisory opinion about whether the Canadian Parliament could legislate and whether the provisions were consistent with the Canadian Charter of Rights and Freedoms. In 2004, the Supreme Court advised that the Federal Parliament could legislate and that to do so would be consistent with the Charter. Subsequently the Canadian *Civil Marriage Act (2005)* passed by a vote of 158 in favour and 133 against.[43]

2.39 A unique element of the Canadian legislation is that it makes explicit the distinction between religious and civil marriage. The definition of 'marriage' specifically provides that it is a definition for 'civil purposes'. It balances this with the freedom of religious groups to refuse to perform marriages that do not accord with their beliefs.

39 *Marriage (Definition of Marriage) Amendment Act 2013* [New Zealand] section 2.

40 New Zealand Parliament, Government Administration Committee, 'Report into the Marriage (Definition of Marriage) Amendment Bill', February 2013, pp 7.

41 *Marriage (Definition of Marriage) Amendment Act 2013* [New Zealand] Sch. 2.

42 Law Connection British Columbia, 'Same Sex Marriage Backgrounder', accessed 25 July 2013 <www.lawconnection.ca/content/same-sex-marriage-backgrounder>.

43 Law Connection British Columbia, 'Same Sex Marriage Backgrounder', accessed 25 July 2013 <www.lawconnection.ca/content/same-sex-marriage-backgrounder>.

The United States of America

2.40 In total, 13 jurisdictions in the United States permit same-sex couples to marry. However, 36 States continue to prohibit same-sex marriage either through legislation or in respective State constitutions.[44]

2.41 The issue of same-sex marriage has received considerable attention in the United States recently, due in particular to two relevant cases heard by its Supreme Court. Both cases relied upon the 'equal protection clause' to dispute the validity of laws forbidding same-sex marriage. The equal protection clause is part of the Fourteenth Amendment to the United States Constitution and provides that 'no State shall … deny to any person within its jurisdiction the equal protection of the law'.[45]

2.42 The first case, arguments for which were heard in March this year, challenged the validity of a Californian referendum which sought to reverse a same-sex marriage law and proposed a constitutional amendment to forbid same-sex marriage in that State (having been initially legalised in 2008). The legal challenge to the referendum questioned whether the equal protection clause of the United States Constitution prevents California from defining marriage as the union of a man and a woman.[46]

2.43 The second case challenged the validity of a 1996 federal law that forbids recognition of same-sex marriages: the Defense of Marriage Act (DOMA). The case was brought by an 83 year old woman who was asked to pay $363,000 in taxes on her late wife's estate because her marriage was not recognised in federal law.[47]

2.44 On 26 June 2013, by a majority of 5 to 4, the Supreme Court ruled in both cases.[48] In the Proposition 8 case the Court held that the petitioners did not have standing to appeal the District Court's order, which meant that same-sex marriages could resume in California. In its separate decision on DOMA, the Supreme Court found that the legislation was in violation of the equal protection clause of the United States Constitution and the Fifth Amendment. Justice Kennedy, with whom four other judges agreed, wrote in his decision:

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44 CNN, 'Same Sex Marriage Fast Facts', accessed 25 July 2013 <http://edition.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/>.

45 United States Constitution, equal protection clause. Note that the Australian Constitution does not preserve a right to equality or non-discrimination.

46 Supreme Court of United States Blog, 'Hollingsworth v Perry', accessed 25 July 2013 <www.scotusblog.com/case-files/cases/hollingsworth-v-perry/?wpmp_switcher=desktop>.

47 Although it was recognised by the State of New York: The Guardian, 'Gay Marriage: DOMA Faces Uncertain Future as Court Questions Law's Validity', 28 March 2013, accessed 25 July 2013 <www.guardian.co.uk/world/2013/mar/27/defense-marriage-act-supreme-court-law>; Supreme Court of the United States Blog, 'United States v. Windsor', accessed 25 July 2013 <www.scotusblog.com/case-files/cases/windsor-v-united-states-2/?wpmp_switcher=desktop>.

48 *United States v Windsor* 570 US (Kennedy J with whom Ginsberg, Breyer, Sotomayor, and Kagan JJ agreed) (2013). Separate dissenting opinions were handed down by Roberts CJ, Scalia J (to which Thomas J joined and Roberts CJ joined as to Part I) and Alito J (to which Thomas J joined as to Parts II and III); *Hollingsworth et al v. Perry et al.* 570 US (Roberts CJ with whom Scalia, Ginsburg, Breyer, and Kagan JJ agreed) (2013). A separate dissenting opinion was filed by Kennedy J in which Thomas, Alito and Sotomayor JJ joined.

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the fifth amendment.[49]

2.45 The Fifth Amendment is part of the Bill of Rights and protects US citizens from abuse of government authority.

United Kingdom

2.46 Until recently, legislation in the United Kingdom (UK) expressly prohibited same-sex marriage. Same-sex couples could have their relationship recognised under the *Civil Partnerships Act (2004)* but their relationships could not be recognised as 'marriage' even if validly solemnised overseas.[50]

2.47 In March 2012 the UK's Government Equality Office commenced a consultation into 'Equal Civil Marriage'. Like consultation processes in other parts of the Commonwealth, the UK Inquiry received a record number of public responses: more than 228,000.[51]

2.48 In December 2012 the UK Government announced that it would proceed with its commitment to introduce a bill for same-sex marriage but would ensure that celebrants and ministers of religion that did not wish to solemnise same-sex marriages would not be required to do so.[52] Consequently, on 24 January 2013 a bill to this effect was introduced into the House of Commons and passed by 400 votes to 175.[53] Having received Royal Assent on 17 July 2013, the law now provides for marriage between same-sex couples but also protects religious organisations and other celebrants from being forced to solemnise same-sex marriages.[54]

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49 *United States v Windsor* 570 US (Kennedy J with whom Ginsberg, Breyer, Sotomayor, and Kagan JJ agreed) (2013).

50 *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

51 Government Equalities Office [UK], *Equal Civil Marriage: A Consultation* (March 2012), p 3, accessed 25 July 2013 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/133258/consultation-document_1_.pdf>.

52 United Kingdom Government, *Equal Marriage: The Government's Response* (December 2012), accessed 25 July 2013 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf>.

53 House of Commons Library [UK], *Marriage (Same Sex Couples) Bill: Research Paper 13/08*, p 1.

54 United Kingdom Parliament, 'Marriage (Same Sex Couples) Act 2013', accessed 25 July 2013, <http://services.parliament.uk/bills/2013-14/marriagesamesexcouplesbill.html>; BBC, 'MPs Vote in Favour of Gay Marriage: Politics Live Blog', accessed 25 July 2013 <www.guardian.co.uk/politics/blog/2013/feb/05/gay-marriage-debate-politics-live-blog#block-5111621695cb1cdb50b9e798>.

Chapter 3 Relationship recognition in New South Wales law

In this Chapter the Committee considers the law that recognises the legal rights of same-sex couples in New South Wales, and describes how the law resolves disputes when a same-sex relationship ends. Inquiry participants' views about the adequacy or inadequacy of the current legal system are also explored.

The Chapter then considers stakeholder opinions as to whether civil unions could provide an acceptable alternative to marriage for same-sex couples. In general, proponents of same-sex marriage perceived alternatives to marriage to be a sub-standard form of relationship recognition and objectors to same-sex marriage were concerned that alternatives such as civil unions will pave the way for marriage reform in the future.

New South Wales law recognising same-sex relationships

3.1 In New South Wales, legal recognition of a same-sex relationship occurs through relationship registration or the attainment of de facto status. Marriage is governed by Commonwealth law and is not recognised between same-sex couples in any Australian jurisdiction (Commonwealth, State or Territory). Chapter 6 describes Commonwealth marriage regulation in the context of a proposed law for same-sex marriage in New South Wales.

De facto status

3.2 In 1984 New South Wales was the first jurisdiction in Australia to recognise property interests between unmarried heterosexual couples. Several other jurisdictions followed suit shortly thereafter. The then definition of 'de facto' was a man and a woman living together in a bona fide domestic relationship although unmarried. In 1999, New South Wales amended the definition to be a couple who live together and are not married or related by family, thus including same-sex couples. It also added certain matters which can be considered by a court in determining de facto status and these matters have largely been adopted by other jurisdictions since.[55]

3.3 To have rights as de facto, the couple will usually have to show that they have lived together for at least two years. If there is a dispute about whether a couple is de facto the court will have regard to whether the relationship was registered and other matters such as the length of the relationship, living arrangements, whether there was a sexual relationship, finances, property, whether the couple had children together and how they presented their relationship

[55] Professor Jenni Millbank, 'The Changing Meaning of 'De Facto' Relationships', *Current Family Law,* 2006, Vol. 12, No. 82, p 2.

in public.[56] In general, if the couple have lived together for less than two years it is unlikely that either party will be entitled to a property settlement should the relationship breakdown.[57]

Relationship registration

3.4 The *Relationships Registration Act 2010* (NSW) provides a scheme for relationship recognition regardless of sex. To be eligible to have a relationship registered, individuals must be over 18, unmarried, not related to the person with whom they wish to register a relationship and not in any other relationship as a couple.[58] At least one party to the registered relationship must reside in New South Wales.[59] When a registered relationship ends, either party can apply to the Registrar to revoke the registration of the relationship.[60]

3.5 Relationship registration is distinguishable from de facto recognition in that the couple need not live together and must have signed a statutory declaration stating, among other things, that they wish to register the relationship.[61] The effect of having a relationship registered is that the couple will be treated as 'de facto partners' for the purposes of most legislation in New South Wales.[62] The dissolution of same-sex relationships

The dissolution of same-sex relationships

3.6 The NSW Parliament has referred to the Commonwealth the power to regulate matters arising from the dissolution of de facto relationships (including registered relationships). These matters include the maintenance of de facto partners, the distribution of the property between them, and the distribution of any other financial resources, including prospective superannuation entitlements or other valuable benefits.[63] For the purpose of this referral, a de facto relationship is defined as 'a marriage-like relationship (other than a legal marriage) between two persons'.[64] This has meant that in many areas of law, the rights of people in New

56 Legal Aid NSW, De Facto Relationships and Family Law, accessed 25 July 2013 <http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/156.pdf>.

57 *Property (Relationships) Act 1984* s 7; Unless the couple have a child together, one party is caring for the child of the other party or one person made substantial financial or personal contributions to the relationship that would not receive adequate compensation otherwise: Law Society of New South Wales, De Facto and Personal Relationships?, accessed 25 July 2013 <www.lawsociety.com.au/community/publicationsandfaqs/legalquestions/Defactandpersonalrelationships/index.htm>.

58 *Relationships Register Act 2010* s 5(3).

59 *Relationships Register Act 2010* s 5(2).

60 *Relationships Register Act 2010* s 11.

61 Registry of Births, Deaths and Marriages, Relationships Register NSW, accessed 25 July 2013, <www.bdm.nsw.gov.au/bdm_mge/bdm_rel.html>.

62 Registry of Births, Deaths and Marriages, Relationships Register NSW, accessed 25 July 2013, <www.bdm.nsw.gov.au/bdm_mge/bdm_rel.html>.

63 *Commonwealth Powers (De Facto Relationships) Act 2003* s 3(1).

64 *Commonwealth Powers (De Facto Relationships) Act 2003* s 3.

South Wales who are in recognised de facto relationships are the same as people who are married.[65]

3.7 In practical terms, this means that de facto couples are able to make an application to the Family Court for a property settlement under the *Family Law Act 1975* (Cth) if they are unable to reach an agreement about how their assets are to be divided. The Court considers a range of factors when determining how property will be divided between de facto partners who have separated. These are the same factors that are considered in respect of property settlements upon a marriage breakdown. Relevant considerations include what each party owned before the relationship commenced; the net value of current assets; financial and non-financial contributions made by each person throughout the relationship; and the future needs of both parties.[66]

3.8 Once the Court determines what proportion of the total assets each party is entitled to, it can make orders about how the division of assets is to occur (for example, by ordering sale of the family home and division of the money from the sale in particular way).[67]

Stakeholder views on existing legal arrangements for same-sex relationships

3.9 In Chapter 4 the Committee covers stakeholder arguments for and against same-sex marriage generally. This section focuses especially on perceived adequacies and inadequacies of the current New South Wales law. Chapter 5 canvasses stakeholder views about whether the failure of current legal arrangements to provide for same-sex marriage is discriminatory.

Stakeholder views that existing legal arrangements are adequate

3.10 A number of Inquiry participants felt that existing forms of relationship recognition adequately addressed any concerns regarding inequality of rights between same-sex and opposite-sex couples.[68] For example Professor Professor Patrick Parkinson AM, Professor of Law at the University of Sydney, argued that Australian relationship law is unduly complex but nevertheless existing forms of relationship recognition already resulted in equal treatment:

> Australian law on relationships is currently in a complete muddle. In various places around the country, there are marriages, civil partnerships, registered de facto

65 The Law Society of New South Wales, De Facto and Personal Relationships?, accessed 25 July 2013, <www.lawsociety.com.au/community/publicationsandfaqs/legalquestions/Defactandpersonalrelationships/>.

66 The Law Society of New South Wales, De Facto and Personal Relationships?, accessed 25 July 2013, <www.lawsociety.com.au/community/publicationsandfaqs/legalquestions/Defactandpersonalrelationships/>.

67 Legal Aid NSW, De Facto Relationships and Family Law, accessed 25 July 2013, <www.legalaid.nsw.gov.au/publications/factsheets-and-resources/defacto-relationships-and-family-law-factsheet/>.

68 Submission 895, Family Voice Australia, p 4; Submission 1163, Catholic Archdiocese of Sydney, p 9; Submission 1165, Revd the Hon Fred Nile MLC, p 7; Submission 1167, Australian Christian Lobby, p 35; Submission 1169, Ambrose Centre for Religious Liberty, p 7; Mr Antoine Kazzi, Former Research Officer, Catholic Archdiocese of Sydney, Evidence, 15 March 2013, p 16.

> relationships, and unregistered de facto relationships, all of which seem to end up being treated in exactly the same way, at least once certain thresholds are met.[69]

3.11 Some religious organisations also contended that there are existing legal mechanisms adequately protect the legal rights of people in same-sex relationships.[70] The Catholic Archdiocese of Sydney submitted that legal matters associated with a relationship breakdown could be dealt with through legal processes that are already available to people in same-sex relationships:

> … the rights and welfare of persons in same-sex relationships… have rightly been provided for by other legislation addressing such issues as medical decision-making, guardianship of children, and the sharing of property. The law can achieve justice while still preserving marriage as a unique institution designed to protect the rights of children. [71]

3.12 Reverend the Hon Fred Nile MLC quoted the comments of openly gay Senator Dean Smith who, in voting against proposals to legislate Federally for same sex marriage in 2012, argued that gay and lesbian Australians already enjoyed the same rights as their heterosexual counterparts:

> The case for equality for gay and lesbian Australians was a battle too-long fought. It must be acknowledged that on the substantive matters of equality in Australia, gay and lesbian Australians can live at law without discrimination. This important achievement was won in 2008 with the passage of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008* and the related bill, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008*. Those bills captured an important principle, that nobody should be discriminated against on account of their sexuality. The bills repealed or amended provisions in Commonwealth law which treated homosexual couples less favourably than heterosexual couples … The right is to have our relationship recognised equally by the State; the right is not to marriage. I do not believe you empower a gay and lesbian relationship simply by giving it the same definition of marriage.[72]

3.13 Christian ethics group, Salt Shakers, argued against not only the creation of new legal arrangements but also opposed existing arrangements on the basis that legal recognition of relationships other than marriage diminishes the institution of marriage:

> We totally oppose any form of relationship registration by the state for same-sex couples – whether civil unions, civil partnerships or relationship registers. We also oppose the granting of any of these 'marriage-lite' forms of relationship recognition/registration for heterosexual couples because they diminish marriage.[73]

Stakeholder views that existing legal arrangements are inadequate

3.14 Conversely, other stakeholders asserted that de facto or registered relationships are an inferior form of relationship recognition when compared with marriage. In writing about de facto

69 Submission 102, Professor Patrick Parkinson AM, Professor of Law, University of Sydney, p 16.

70 Submission 895, p 4; Submission 1163, p 9; see also Mr Kazzi, Evidence, 15 March 2013, p 16.

71 Submission 1163, p 9.

72 Submission 1165, p 7 quoting Dean Smith.

73 Submission 1164, Salt Shakers, p 6.

relationships in their submission, Parents and Friends of Lesbians and Gays observed that proving de facto status can be difficult and offers no solution for legitimate couples who cannot satisfy these requirements:

> 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.[74]

3.15 A similar point was made by the Inner City Legal Centre which noted some of the distinctions between de facto and registered relationships. For instance, the Centre observed that de facto relationships must be proven to be of at least two years in duration to affect property rights and also pointed to difficulties faced by the de facto partners of Australian visa sponsors:

> The legal difference between a registered relationship, which creates a presumption that a relationship exists, and a de facto relationship, which places an evidentiary onus on couples to positively establish their relationship, is well documented. To note but a few under Federal law:
>
> - Members of a de facto relationship can only engage the property adjustment and maintenance provisions of the Family Law Act 1975 (CTH) if they can prove that their relationship exceeds the minimum duration of 2 years. Registered relationships are exempt from this requirement.
> - De facto partners of an Australian sponsor are required to be in a relationship with that sponsor for at least 1 year before they can apply for most visas. Registered relationships are exempt from this requirement. In our experience, this is impossible for many couples as the migrating party is often leaving a country in which homosexuality is illegal. Proving a de facto relationship by living with the partner in his/ her home country for periods of time is therefore often impossible.[75]

3.16 The Inner City Legal Centre informed the Committee of some research it had done that found while same sex couples possess certain rights for relationship recognition, few knew about them.[76] The Centre further submitted that, on this basis, it is important to ensure 'relationship rights across NSW that are consistent, certain and practical'.[77] The certainty of relationship rights in law, and how a New South Wales law permitting same-sex marriage might affect them, is considered in greater detail in Chapter 6 and 7.

Civil unions as an alternative to same-sex marriage

3.17 The Committee heard from legal academics that that there would likely be few if any legal obstacles to New South Wales legislating to provide for same-sex civil unions. Professor Anne Twomey, Professor of Law at the University of Sydney, expressed this as follows:

74 Submission 1083, Parents and Friends of Lesbians and Gays, pp 8-9.

75 Submission 1254, Inner City Legal Centre, p 6.

76 Submission 1254, p 4.

77 Submission 1254, p 5.

> Establishing same-sex civil unions, rather than 'marriage' would make it easier to argue that these relationships were separate from and did not purport to enter into a field covered by the Commonwealth's law with respect to marriage. … It would be different in name and in substance (because it would involve same-sex couples) and would be separate from the religious connotations of marriage and the historical associations of the word. I think that this would be much more likely to survive a [section] 109 inconsistency challenge than a State Act that deals with 'marriage equality'.[78]

3.18 While not expressing support for the idea of same-sex civil unions, Lawyers for the Preservation of the Definition of Marriage agreed that it would not give rise to the same constitutional impediments as same-sex marriage. However, they also suggested that such alternatives to marriage had failed elsewhere:

> Provided state civil union legislation does not mimic marriage to the extent that it would really be marriage under a different name, there would be no constitutional impediments. … The evidence is clear that alternatives to marriage are not successful by objective measures. There are therefore large policy issues in relation to such legislation …[79]

Stakeholder views on civil unions as an alternative to marriage

3.19 The Committee received little evidence from proponents or objectors to same-sex marriage advocating a civil union scheme. Many arguments for and against civil unions are comparable to those for and against other forms of relationship recognition for same-sex couples.

A sub-standard form of relationship recognition?

3.20 Australian Marriage Equality explained to the Committee that the expression 'civil union' is used to describe any formally recognised personal union of two adults that is not marriage.[80] A number of stakeholders emphasised functional and symbolic differences between marriage and civil unions to support their view that civil unions constitute an inferior form of relationship recognition. For example, ACON submitted:

> Civil unions are a separate institution that would be created specifically in the context of the GLBT community demanding equal access to marriage. Having civil unions would not confer the same degree of recognition that marriage would, and would not address the current discrimination where a section of the community are prevented from accessing marriage and thus be discriminated against on the basis of their sexual orientation. A separate institution for a community that demands equal access to a civil institution is not full equality.[81]

3.21 In line with this view, several stakeholders argued that alternative forms of relationship recognition including civil unions fail to ensure equality between the treatment of same-sex

78 Answers to supplementary questions, Professor Anne Twomey, Professor of Law, University of Sydney, 6 March 2013, received 27 March 2013, pp 1-2.

79 Submission 623, Lawyers for the Preservation of the Definition of Marriage, p 6.

80 Submission 1228, Australian Marriage Equality, pp 5-6.

81 Submission 1120, ACON, p 7.

and opposite-sex couples.[82] Mr Malcolm McPherson, NSW Convenor, Australian Marriage Equality stated:

> I was in a marriage with a woman for 27 years. I take marriage quite seriously. I suppose I am in a position, having been there, to understand the difference. Currently in Australia we basically do have two forms of marriage. We have marriage under the Marriage Act and we have de facto marriage through the Family Law Act. For a person of my generation or earlier, de facto marriage had a lower social status. … Under de facto legislation there are a whole lot of issues that the bureaucrats or courts can take into account. What we want to do at least at State level is have our marriages, our relationships, recognised as being equally valid and valuable. Civil unions just does not do that, it is just putting another name on it; whereas if we have marriage at a State level that is the beginning.[83]

3.22 He went on to say:

> My ex-wife was able to remarry and marry the man she loves. I do not have the freedom to do the same. Essentially I am a second-class citizen and my children do not deserve to have a father who is a second-class citizen.[84]

3.23 Several Inquiry participants posited that the creation of a separate form of relationship recognition would only further existing prejudices[85] and constitutes a duplicitous system of relationship recognition.[86] The NSW Gay and Lesbian Rights Lobby maintained that a two-tiered system refuses same-sex couples the symbolic benefits of marriage:

> Forms of relationship recognition, such as the State relationships register or a civil union scheme, whilst having a place for those who do not wish to enter into marriage, create a tiered system of relationship recognition in the absence of access to the institution of marriage for same-sex couples, which currently serves to prevent access to the significant symbolic benefits that the institution of marriage confers on those who enter into it.[87]

3.24 Mr Stephen Sanders considered that his commitment ceremony with his long-term partner felt somehow second-class compared with state-sanctioned marriage. He argued in favour of same-sex marriage and suggested that alternatives such as civil unions and relationship registration exist under a pretence of common-sense but ultimately just entrench discrimination:

> The recognition of same-sex relationships is slowly spreading across Australia, however, the progress is slow, hard-fought and often ends in undesirable outcomes such as civil unions legislation and various relationship registers. Such inequitable outcomes merely continue to enforce discrimination, inequality and social injustice by

82 Submission 38, Ms Cate O'Mahony, p 1; Submission 624, Elsie Women's Refuge, p 1; Submission 1162, Women's Legal Services NSW, p 3.

83 Mr Malcolm McPherson, NSW Convenor, Australian Marriage Equality, Evidence, 15 March 2013, p 23.

84 Mr McPherson, Evidence, 15 March 2013, p 23.

85 Submission 1083, pp 9-10; Submission 1215, NSW Council for Civil Liberties, p 5; Submission 1210, University of Sydney Students' Representative Council, p 3; Submission 1228, p 54.

86 Submission 1083, pp 9-10; Submission 1166, NSW Gay and Lesbian Rights Lobby, p 6.

87 Submission 1166, p 6.

> legally and socially further entrenching discrimination and endorsing the view held by some on the inferiority of gay relationships vis-à-vis heterosexual marriage, while trying to masquerade as a common sense, reasonable compromise for the benefit of all.[88]

3.25 Furthering this perspective, Parents and Friends of Lesbians and Gays, the NSW Council for Civil Liberties, and others, stipulated that a two-tiered system of relationship recognition entrenches stereotypes about same-sex couples being different or somehow inferior.[89] Parents and Friends of Lesbians and Gays put this view as follows:

> 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.[90]

3.26 Some submissions referred to a 2010 study entitled *Not So Private Lives* that was undertaken across Australia in 2010.[91] The study considered the responses of 2,032 same-sex attracted people aged 18-82. Findings of the study that were highlighted by the Australian Psychological Society included that the majority of same-sex attracted people surveyed preferred marriage to civil unions.[92]

3.27 Mr Rodney Croome AM, National Director, Australian Marriage Equality, argued that only marriage joins a person to their partner's family in a way not possible through civil unions or de facto relationships:

> Only marriage joins you to your partner's family and joins your partner to your family and allows you to use terms like "brother-in-law", "mother-in-law", and to have that sense of belonging. Civil unions do not do that; de facto relationships do not do that. That is unique and important. It is not about devaluing other relationships. It is about recognising what is special about marriage.[93]

3.28 That civil unions would not enjoy the same recognition as marriage overseas was another reason some supporters of same-sex marriage opposed alternative schemes.[94] For instance, Parents and Friends of Lesbians and Gays said that while there was some value in alternative forms of relationship recognition, they were inferior to that available through marriage in part because only marriage offers international portability:

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88 Submission 571, Mr Stephen Sander, p 2.

89 Submission 1215, p 5; Submission 571, p 2; Submission 1083, pp 9-10; Submission 1210, p 3.

90 Submission 1083, pp 9-10.

91 Submission 1209, the Australian Psychological Society, pp 7-9; Submission 1228, p 51.

92 Submission 1209, pp 7-9.

93 Mr Rodney Croome AM, National Director, Australian Marriage Equality, Evidence, 15 March 2013, p 25.

94 Submission 1120, p 7; Submission 1083, p 9; Submission 1228, p 55.

> 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.[95]

An endeavour worth pursuing?

3.29 Other Inquiry participants made strong declarations against civil unions arguing that they were pointless and served no real purpose. For example, FamilyVoice Australia argued that there was no need for Governments to regulate relationships other than marriage because such relationships would not result in children:

> There is no valid purpose for governments to register civil unions or "same-sex marriages". The only reason governments regulate marriage is because of its potential for conceiving, bearing and raising the next generation with both biological parents. Governments have no interest in registering the relationships of two people who live together for other reasons – such as best friends, or interdependent carers.[96]

3.30 Even supporters of same-sex marriage were not very supportive of a civil union scheme but perceived a different kind of irrelevance to civil unions. A number of advocates for same-sex marriage felt that civil unions offer little more than the existing relationship registration system available to same-sex couples in New South Wales.[97] Mr Croome held this view:

> You could create a civil union scheme in New South Wales that is as close to marriage as possible, like the scheme that they proposed in the Australian Capital Territory [ACT] in 2006. That is like marriage in every way except that is called a civil union. I do not believe that that would carry any greater weight than your current scheme. That is certainly the international experience.[98]

3.31 At the same time, however, Mr Croome also observed that in other jurisdictions, same-sex marriage has come about because civil unions have failed to create the equality they were intended to:

> In Britain and New Zealand, they are moving now rapidly towards marriage equality precisely because the civil union experiment failed. It failed to provide same-sex couples with equal social, cultural and even legal recognition. According to reports that have been produced in both those countries— … same-sex couples report that their relationships are not respected or understood by others, including family members—their civil partnerships. They report that people in authority do not understand that they have the legal rights that they do, including school principals and people in hospitals and all the rest. They say, "We're in a civil partnership", and people say, "Well, is that a marriage or not?"[99]

95 Submission 1083, p 9.

96 Submission 895, p 4.

97 Submission 1166, p 6.

98 Mr Croome, Evidence, 15 March 2013, p 26.

99 Mr Croome, Evidence, 15 March 2013, p 26.

3.32 Then again, Australian Marriage Equality expressed support for civil unions for all couples as long as it was not a substitute for (but rather an alternative to) same-sex marriage:

> In principle, Australian Marriage Equality supports civil union schemes for those couples who do not wish to marry but who seek certification of their relationship status. However, as with de facto laws, we oppose civil unions as a substitute for equality in marriage. Again, a choice should be available as to which form of relationship most suits the couple in question.[100]

Opposition to civil unions as a stepping-stone to marriage

3.33 Indeed, that civil union schemes had led to same-sex marriage in other jurisdictions was a reason other stakeholders opposed the idea.[101] Several Inquiry participants who objected to same-sex marriage were concerned that permitting civil unions between same-sex couples would ultimately lead towards marriage.[102] For example, the Catholic Archdiocese of Sydney submitted:

> …[the experience in some jurisdictions] demonstrates that civil unions serve primarily as an interim compromise and legislative "stepping stone" to same-sex marriage. The public declarations of lawmakers who sponsored and voted for civil union legislation in these places that such legislation would not lead to same-sex marriage have now clearly proven to be empty words.[103]

3.34 The National Marriage Coalition opposed any form of civil union for two reasons. In a perspective echoing that of the Catholic Archdiocese of Sydney and others,[104] it submitted that civil unions could provide a platform for later changes to allow for same-sex marriage. The Coalition also argued that civil unions could provide an incentive for opposite-sex couples not to marry and could undermine the importance of marriage more generally:

> Civil unions mean that the state declares an interest where it has none in terms of relationships. If the state legislates for heterosexual civil unions, it provides an incentive not to marry and thus detracts from marriage directly - as already exists in NSW and elsewhere in the form of Relationship Registers, passed in 2010. If the state legislates for homosexual civil unions it will take further territory reserved for married couples by virtue of declaring an interest in such relationships, where it has none, and at the same time overlaps with a declaration of interest in married couples for the sake of children. The action muddies the importance of marriage and its unique place in Australian society, thereby decreasing its standing and importance.[105]

100 Submission 1228, p 55.

101 Submission 1040, National Marriage Coalition, p 28; Submission 1163, p 9.

102 Submission 1163, p 9; Mr Graeme Mitchell, State Officer, Family Voice Australia (NSW and ACT), Evidence, 15 March 2013, pp 7-8.

103 Submission 1163, p 9.

104 Submission 1163, p 9; Mr Mitchell, Evidence, 15 March 2013, p 7; Mr Rocco Mimmo, Founder and Chairman, Ambrose Centre for Religious Liberty, Evidence, 15 March 2013, p 50.

105 Submission 1040, p 28.

3.35 Other religious organisations did not oppose legal recognition of same-sex relationships, as long as that recognition was not called "marriage".[106] The Organisation of Rabbis of Australasia put forward the following opinion:

> There is no doubt that society and government must protect all citizens from discrimination, including from discrimination on the basis of sexual preference, but this can be done in other ways, without granting a homosexual union the status and indeed sanctity of marriage.[107]

Committee comment

3.36 The Committee found that there was little support for civil unions from both proponents and objectors to same-sex marriage. In general, those opposed to same-sex marriage considered that civil unions would constitute the first step towards same-sex marriage and objected to the idea on that basis. Proponents of same-sex marriage offered only lukewarm support for a civil union scheme and overall felt that civil unions lacked the symbolic significance of marriage and provided little more rights or recognition than existing law.

3.37 The Committee acknowledges that New South Wales already has a system of relationship recognition for same-sex couples through its relationship register and recognition of de facto status. In our view a civil union scheme adds little to the existing legal system in practical terms.

106 Submission 1251, Organisation of Rabbis of Australasia, p 1; Submission 1208, Hindu Council of Australia, p 1.

107 Submission 1251, p 1.

Chapter 4 Social attitudes to marriage

Most submissions to this Inquiry addressed social concerns about same-sex marriage. In this Chapter the Committee presents some of the dominant themes among submissions and other evidence.[108] Stakeholders paid much attention to the historical, religious and symbolic meaning of the word 'marriage'. The obvious and heavily contested point of disagreement was whether a union must be between a man and a woman in order to constitute a 'marriage'.

What 'marriage' means to people in New South Wales

4.1 Submission-makers to this Inquiry generally agreed that the symbolic meaning of the word 'marriage' is important. Mr Christopher Puplick AM and Mr Larry Galbraith emphasised the importance that words can have:

> Words matter.
>
> They are redolent with deep and inherent meaning in that they describe what we want to convey to another person about ourselves or others, or what others wish to convey about us. They define us by describing our status in a way which has actual meaning – either socially or legally.[109]

4.2 Advocates for same-sex marriage argued strongly that this is the very reason they call for marriage rights over and above any other form of union.[110]

4.3 Mr Antoine Kazzi, a former Research Officer at the Catholic Archdiocese of Sydney, told the Committee that in his view '[w]hat is in issue is the notion of marriage. It is more than a piece of paper and it is more than a bundle of rights.'[111] Professor Nicholas Tonti-Filippini stated:

> What is at stake in this redefinition is the biological reality of the two in one flesh union between a man and a woman, and its importance to children. Biological marriage establishes rights and duties in relation to children because the couple is bound to each other and to the child at every level: genetic, gestational, nurturing, social, physical and spiritual.[112]

4.4 Many individuals and organisations objected to the use of the word 'marriage' to describe a union between two people of the same sex.[113] For instance, Bishop Peter Comensoli, Auxiliary Bishop, Catholic Archdiocese of Sydney, said that the use of the word 'marriage' would be a major issue for them:

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108 The Committee notes that there have already been thorough and wide-ranging national inquiries into same-sex marriage. These received hundreds of thousands of public responses and provide a thorough assessment of the perspectives about same-sex marriage from across Australia.

109 Submission 1257, Mr Christopher Puplick AM and Mr Larry Galbraith, p 9.

110 Submission 1253, Castan Centre for Human Rights Law, p 14; Submission 1257, p 9.

111 Mr Antoine Kazzi, Former Research Officer, Catholic Archdiocese of Sydney, Evidence, 15 March 2013, p 16.

112 Submission 997, John Paul II Institute for Marriage and Family, p 2.

113 See, eg, Submission 219, David E. Swinfield, p 1; Bishop Peter Comensoli, Auxiliary Bishop, Catholic Archdiocese of Sydney, Evidence, 15 March 2013, p 11.

> I think the key issue there for us would be in the use of the word. The word "marriage" has come out of the reality of this coming together of a male and a female for love and for life, both of those being important. That has come to be defined in terms of the word "marriage". If we are talking about what is marriage, then there is the definition of it. To start talking about same-sex unions as marriage is to take this unique reality and apply it to something that is different. If the New South Wales Parliament is looking at some sort of legislation around same-sex unions for whatever purposes you see that that is to be done, it is not marriage—at least as I am presenting it to you today. The use of the word itself is problematic.[114]

4.5 Similarly, several stakeholders said that they were in favour of same-sex couples having equal legal rights but that the word for these rights should not be 'marriage'.[115] A reason commonly cited for this was their belief that only the union of a man and a woman has the potential to produce offspring, which is a fundamental part of the purpose of recognising marriage. The Lutheran Church for example expressed support for the recognition in law of same-sex relationships but concurred with others that the use of the word 'marriage' to describe that recognition was unacceptable:

> Even though the Lutheran Church of Australia can support the Federal Parliament in providing legal recognition and protection for same sex partnerships as something that is socially responsible, it opposes any legislation that equates same sex partnerships with the union of a woman and a man in marriage and uses the same term for both.[116]

4.6 The Presbyterian Church of New South Wales maintained that to legislate for same-sex marriage would dilute the significance of marriage, making the institution less meaningful as a result:

> Same sex marriage redefines marriage by removing the very features which are essential to marriage and make it socially significant. The result would be that same sex couples would be granted access to an institution which has lost the value which led them to seek participation in the first place.[117]

Have social perceptions about marriage changed?

4.7 A point made by several Inquiry participants was that changes to the law governing marriage are illustrative of widely accepted changes to its social meaning. There was a strong view put to the Committee by some participants that the meaning of marriage is not fixed.[118] For example, the State Parliamentary Marriage Equality Working Group submitted:

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114 Bishop Comensoli, Evidence, March 15 2013, p 11.

115 See, eg, Submission 241, Mr Frank and Mrs Barbara Wood, p 1; Submission 251, Mr Laurence Kettlewell, p 1; Submission 882, Mr Robin Patterson, p 1; Submission 1068, Lutheran Church of Australia, p 2; Submission 1208, Hindu Council of Australia, p 1; Submission 1221, Presbyterian Church of New South Wales, p 3.

116 Submission 1068, p 2.

117 Submission 1221, p 3.

118 See, eg, Submission 90, Professor George Williams AO, Attachment 1, p 8; Submission 521a, State Parliamentary Marriage Equality Working Group, p 1; Submission 1083, Parents and Friends of Lesbians and Gays, p 15; Submission 1215, NSW Council for Civil Liberties, pp 3-4; Submission 1253, pp 4-5; Submission 1257, pp 11-17.

> The "institution of marriage" is not a fixed and immutable concept. Rather, it has, over the centuries, and in different societies, been changed and adapted to meet the differing needs and mores of the community.[119]

4.8 Like many others, the NSW Council for Civil Liberties was not convinced by arguments that the meaning of the word 'marriage' is immutable. It submitted that the assertion that marriage just *is* the union of a man and a woman shows a misunderstanding of the history of the institution and erroneously presumes the meaning of words are not subject to change:

> Further, that notion involves essentialism with respect to the concept of marriage. That is, it supposed that the meaning of the word cannot be changed.
>
> The notion that marriage has always been the same, and it just **is** the union of a man and a woman to the exclusion of all others is not informed by knowledge of the history of the institution.[120]

4.9 Some individuals drew on personal experiences and explained to the Committee that where once they may have been against same-sex marriage, they were not opposed to it anymore. For instance, Mr Geoffrey Thomas, the parent of a gay son and member of Australian Marriage Equality, said when his son professed he was gay it made him review his personal beliefs. He explained that he came from a background that did not like gay people but he ultimately concluded that his previous views were prejudicial and the result of bigotry:

> Fundamentally it means that my son is equal to everybody else. It is a simple premise, isn't it? I grew up homophobic. I spent nine years in the army, I am a Vietnam veteran and I am a plumber—I come from that environment that didn't like gays. When my son came out shortly before my wife passed away I was confronted with something that challenged my beliefs. I had a very quick look at why it was that I did not like gays and really it comes down to fear, ignorance, prejudice and good old bigotry.[121]

4.10 Other participants in the Inquiry held a different view. For instance, the Australian Christian Lobby stated that:

> Marriage has held its meaning as the union of a man and a woman throughout history. This definition transcends time, religions, cultures and people groups. Even in those societies which accepted or even encouraged homosexuality, marriage has always been a uniquely male-female institution.[122]

4.11 Other specific examples of changes to the law of marriage are provided for in Chapter 6 at paragraphs 6.30-6.31. They include that marriage is no longer a defence to rape and the inability to consummate a marriage is not grounds for having a marriage nullified.

Surveys and studies of attitudes to marriage in Australia

4.12 A number of organisations and individuals pointed to various surveys, studies and polls to bolster their argument for or against same-sex marriage.

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119 Submission 521a, p 1.

120 Submission 1215, pp 3-4 [original emphasis].

121 Mr Geoffrey Thomas, Member, Australian Marriage Equality, Evidence, 15 March 2013, p 20.

122 Submission 1167, Australian Christian Lobby, p 4.

4.13 Those in favour of same-sex marriage directed the Committee to recent polling showing majority public support for same-sex marriage.[123] For example, Mr Rodney Croome AM, National Director, Australian Marriage Equality, referred to 'dozens' of polls that illustrated majority support for same-sex marriage:

> … there have been literally dozens of national polls on this issue by a whole range of different polling companies, Galaxy and Morgan and Newspoll and all the rest. … Whatever the question is, whatever the polling company is, the result is always the same that between 60 and 68 per cent of Australians support the right of same-sex couples to be able to marry and about 30 to 35 per cent oppose. That is so consistent that I think we have to take it as a very good indication of where Australians stand, including New South Welsh people.[124]

4.14 These findings were not accepted by other Inquiry participants who asserted that support for same-sex marriage was apparent only in minority fringe elements of the community. For instance, Protect Marriage Australia, asserted that parliamentary inquiries such as the present amount to political pandering to the 'radical left' minority. It further asserted that its members 'see the bold face of minority groups trying to radicalise society with their single minded agenda without regard for the effect on families and children throughout our nation.'[125]

4.15 Others contended that support for same-sex marriage exists in a very broad cross-section of the community.[126] For example, the Law Society of New South Wales referred to specific polls conducted by Neilsen and Galaxy Research showing that more than half of religious people surveyed were in favour of same-sex marriage and that support is highest among young people and families with young children. The only demographic within which there was a majority opposed to same-sex marriage was people over 50 years of age:

> Even allowing for religious beliefs, 53% of Christians polled by Galaxy Research conducted in August 2011 supported same-sex marriage. In the same survey, people of other religions polled their support at 62%, and people of no religious affiliation polled their support at 67%. Support for marriage equality is highest among families with young children (72%) and people below 24 years of age (80%). The only age demographic in which support for marriage equality is not higher than levels of opposition are people over 50 years of age. The split is 46% support and 46% opposition. This suggests that support for marriage equality reflects a social value that is likely to become an enduring mainstream norm.

4.16 A large number of stakeholders asserted that opinion polls could be 'loaded' and 'simplistic' and questioned whether they illustrate actual public opinion.[127] For example, Dr David Phillips, National President of FamilyVoice Australia, said that surveys can be implausible due

123 Submission 1083, p 16; Submission 1121, Australian Lawyers Alliance, p 2; Submission 1166, NSW Gay and Lesbian Rights Lobby, p 7; Submission 1216, Atheist Foundation of Australia Inc, p 1; Submission 1256, Law Society of NSW, p 5; Mr Rodney Croome AM, National Director, Australian Marriage Equality, Evidence, 15 March 2013, p 24.

124 Mr Croome, Evidence, 15 March 2013, p 24.

125 Submission 1252, Protect Marriage Australia, p 8.

126 Submission 1256, p 5; Submission 1257, p 11.

127 Submission 176, Mr Andrew Hawes, p 1; Submission 236, Mr Peter and Mrs Joan Whiley, p 1; Submission 244, Mr Mark Murray, p 1; Submission 390, Mr Anthony G. and Mrs Lynne C. Mullins, p 1; Submission 470, Mr Christopher Ottaway, p 1; Submission 472, name suppressed, p 1.

to their construction. He suggested that even carefully constructed surveys of public opinion may not produce results that accurately reflect individual beliefs:

> Even neutrally carefully constructed surveys do not necessarily reveal what people actually believe. I think the evidence of that is in the republic referendum in 1999 where Gallup opinion polls were saying that 55 per cent supported the republic. When people were actually able to vote confidentially on the matter when it was a serious vote, it was 55 per cent against. If it is a telephone poll people may feel pressured by perceived political correctness to answer in a particular way. Yes, opinion polls provide some information but not necessarily the last word on the subject.[128]

4.17 Some religious organisations drew the Committee's attention to a study undertaken by the Ambrose Centre for Religious Liberty, which found that individuals had more conflicted views about same-sex marriage than other polls have suggested.[129] The Australian Christian Lobby explained that the study found that although a majority of respondents supported same-sex couples right to marry, only 49 per cent supported changes to the Commonwealth Marriage Act:

> After the initial question about same-sex couples having the right to marry, with which 58 per cent of respondents agreed, 135 more probing questions were asked of participants. These show that while there may be support in principle for same-sex marriage, there is significantly less support for change at the expense of marriage as they understand it. A minority of people – 49 per cent – support changing the Marriage Act.[130]

4.18 The Australian Christian Lobby further observed that according to the Ambrose study, most people do not feel strongly about same-sex marriage[131] and it is an important issue to only a minority of Australians:

> The survey also shows that a majority of people, both those who support and oppose redefining marriage, believe that the issue is a "distraction and a waste of resources" and that: "politicians need to re-focus on the more important issues that really matter to mainstream Australians."[132]

4.19 The Catholic Archdiocese of Sydney suggested that people who voice opinions opposing same-sex marriage risked being labelled homophobic or bigoted and that fear of such treatment can stifle an open debate. Implicit in its submission was that some people opposed to same-sex marriage might not feel comfortable about speaking-up:

> It has become increasingly challenging to express a view in favour of marriage between a man and a woman when to do so means risking being unfairly labelled 'homophobic' or 'bigoted'. Sadly, the debate is frequently framed in such a way that people feel compelled to agree – a framing that prematurely shuts down debate and does not allow for the expression of nuance or ambivalence.[133]

128 Dr David Phillips, National President, FamilyVoice Australia, Evidence, 15 March 2013, p 5.

129 Submission 1163, Catholic Archdiocese of Sydney, p 10.

130 Submission 1167, p 39.

131 Submission 1167, p 39.

132 Submission 1167, p 40.

133 Submission 1163, p 9.

4.20 Potential discrimination against objectors to same-sex marriage is addressed in Chapter 5 from paragraph 5.23.

Religion and marriage

4.21 Many submission-makers expressed beliefs that same-sex marriage would be contrary to the teachings of God, the Bible, the Koran or other religious texts.[134] Those of this view emphasised that it is an essential element of marriage that the union exists between a man and a woman and as such it is fallacious to describe a union between partners of the same sex as a 'marriage'.[135] Bishop Comensoli stated that:

> Marriage certainly helps to build strong families, and strong families mean a stronger community, as Premier Giddings down in Tasmania has recently remarked. But this strengthening of families and societies depends on ensuring the right kind of sexual union is upheld. That best-practice union is marriage between a man and a woman, for the sake of the children that they have. Parliaments like the New South Wales Parliament have a duty to ensure that what makes for best practice is enshrined in law.[136]

4.22 The Clarence Branch of the Christian Democratic Party (CDP) expressed this view as follows:

> … the majority world view of marriage is the commitment to a lifelong union of one man and one woman. The man and woman in a public ceremony are joined together through an exchange of promises and leave their home of origin to start their own home and family. This is marriage and the reality is that anything different is not marriage.[137]

4.23 Mr Puplick and Mr Galbraith argued in their submission that religious arguments against legislative change in the present context illustrate a failure to reconcile the difference between marriage as a religious and a civil institution.[138] They also argued that religious objections to the use of the term 'marriage' to describe same sex unions overshadow a deeper hostility towards homosexuality generally:

> …while a great deal of the opposition to same-sex marriage from religious groups and the mainstream Churches in particular is couched in terms of the "defence of traditional marriage" the truth is that the opposition lies far deeper. It lies in the

134 See, eg, Submission 178, Ms Jenny James, p 1; Submission 183, Mr Chris Athavle, p 1; Submission 308, Mr John Doyle, p 1; Submission 1069, Living Success Christian Centre Inc, p 1; Submission 1131, Knights of the Southern Cross, p 2; Submission 1164, Salt Shakers, p 5; Submission 1168, Australian Christian Churches, p 1; Submission 1205, NSW Council of Churches, pp 3-4; Submission 1221, p 2; Submission 1206, Association of Baptist Churches of NSW and ACT, p 2; Submission 1208, p 1; Submission 1251, Organisation of Rabbis Australasia, p 1.

135 Submission 1075, Family Life International, p 1; Submission 1077, Christian Democratic Party – Clarence Branch, p 2; Submission 1221, p 2; Submission 1252, p 3; Mr Kazzi, Evidence, 15 March 2013, p 16.

136 Bishop Comensoli, Evidence, 15 March 2013, p 11.

137 Submission 1077, p 2.

138 Submission 1257, p 18; this distinction is canvassed further in paragraphs 5.16 to 5.22 of Chapter 5.

> intrinsic hostility and rejection of homosexuals and homosexuality by these religious organisations and their continuing hostility towards them.[139]

4.24 Not all religious groups that made submissions to the Inquiry were opposed to same-sex marriage.[140] For example, the Paddington Uniting Church submitted that its congregation has spent 'considerable time' researching both theological and secular arguments about same-sex marriage, and in November 2011 the congregation unanimously passed a resolution supporting it. The Church submitted that in reaching this decision its members were aware of the distinction between civil and religious marriage, and were of the view that there were strong public policy and theological arguments for same-sex marriage. The Church also acknowledged that the broader Uniting Church currently defines marriage as between one man and one woman:

> On 27 November 2011 the Congregation passed a unanimous resolution to support marriage equality.
>
> Members of the Congregation were aware of a number of matters:
>
> 1. The importance of distinguishing between 'public policy' arguments about marriage equality and religious or theological arguments relevant only to religious organisations
>
> 2. The overwhelming public policy arguments in favour of changing the law to allow marriage equality, and
>
> 3. The strong theological arguments in favour of marriage equality within the church, while noting the existing Uniting Church in Australia definition of marriage excludes same-sex couples.[141]

Biology and procreation

4.25 The Committee received a large number of submissions stating that the fundamental purpose of marriage is the biological facilitation of procreation and for this reason same-sex marriage should not (or could not) exist.[142] Some argued that this was 'natural' and that homosexuality was 'unnatural'.[143] In a view typical of many,[144] Family Life International (Australia) Ltd

139 Submission 1257, p 20.

140 See, eg, Submission 675, Metropolitan Community Church Sydney, p 1; Submission 1067, Paddington Uniting Church, pp 2-6.

141 Submission 1067, pp 2-6.

142 See, eg, Submission 138, Mrs Sharon Munro, p 1; Submission 140, Mr Denis Colbourn, p 1; Submission 166, Ms Lakshan Rodrigo, p 1; Submission 178, p 1; Submission 180, Ms Tuisiong Hie, p 1; Submission 256, Ms Georgina Stanica, p 1; Submission 306, name suppressed, p 1; Submission 307, Ms Orysia Ellis, p 1; Submission 313, Dr Peter Keith, p 1; Submission 320, St Paul's Anglican Church, Kogarah, p 1; Submission 490, Dr Noel Weeks, p 1; Submission 805, Mr Andy Skarda, p 1; Submission 996, Endeavour Forum Inc, p 1; Submission 1072, Voice of Victory Church, p 1; Submission 1075, p 1; Submission 1131, p 3; Submission 1161, Dads4Kids Fatherhood Foundation, pp 10-11; Submission 1205, p 3; Submission 1208, p 1; Dr Phillips, Evidence, 15 March 2013, pp 5-6.

143 Submission 490, p 1; Submission 1164, p 3; Submission 1205, p 3.

144 See, eg, Submission 1163, p 5; Submission 1208, p 1; Dr Phillips, Evidence, 15 March 2013, p 2.

submitted that marriage facilitates the natural union of a man and a woman to found a family and forms the foundation of our society. In its view, marriage should be defended accordingly:

> Throughout human history, marriage has been understood to be a union between a man and a woman to the exclusion of all others, with the intention of bringing children into the world through their sexual union. The family thus formed by this heterosexual, natural union, has underpinned all cultures and has been the basic building block of society. The responsibility of the State in securing its own interests, has been to protect and defend this natural institution of marriage and the family.[145]

4.26 This perspective was taken further by some stakeholders who expressed concern about Australia's population if same-sex couples were to get married.[146] Those of this view claimed that there is an economic imperative for retaining marriage as an exclusively heterosexual union.[147] For example, Dr Phillips, National President of FamilyVoice Australia, asserted that governments should be encouraging sufficient births to replace the population and accordingly should be fostering a social environment where this is likely to occur:

> Children need to be born in order to produce a citizenry of the future, and in those countries where the fertility rate is down to not much more than one the expectation is that the population of those countries will halve in the next 50 years or so and, if that continues, an entire nation or community or culture can disappear simply through children not being born. So, governments have a legitimate interest in encouraging the birth of sufficient children to replace the current generation.[148]

4.27 Other Inquiry participants disputed that 'natural procreation' is a legitimate reason for not permitting same-sex marriage.[149] Some questioned the logic of this rationale given that many heterosexual couples are infertile.[150]

4.28 Some stakeholders maintained that the focus on procreation as an essential element of marriage is illogical.[151] Mr Aaron Allegretto submitted that marriage must be about more than children or religion, otherwise many couples would not be permitted to marry. He listed examples of heterosexual couples who might thus be excluded:

> Marriage is not necessarily just about children or a religious ceremony, otherwise a marriage would not be recognised between:
>
> 1. an atheist and another person;
>
> 2. an infertile couple;

145 Submission 1075, p 1.

146 Submission 141, Mrs Gwenda Waddington, p 1; Submission 1161, pp 10-11; Dr Phillips, Evidence, 15 March 2013, p 2.

147 Submission 1161, pp 10-13; Dr Phillips, Evidence, 15 March 2013, p 2.

148 Dr Phillips, Evidence, 15 March 2013, p 2.

149 See, eg, Submission 526, Mr Aaron Allegretto, p 2; Submission 1257, p 32.

150 Submission 103, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Attachment 2, p 32, referring to a decision of the Massachusetts's Supreme Court; Submission 526, p 2; Submission 1257, p 32.

151 Submission 1257, p 32.

3. an elderly couple;

4. a couple who have no intention of having children.[152]

4.29 However, the Australian Christian Lobby responded to this counter-argument that while some heterosexual couples may be infertile, the legal recognition of marriage remains predicated on that biological function:

> The law recognises, promotes and protects marriage. While not every married couple will be able to have children, the legal recognition of marriage is predicated largely on this biological function.[153]

4.30 From a biblical perspective, the Paddington Uniting Church also disputed the definitional connection between marriage and procreation. It argued that the scriptures themselves do not stipulate that a marriage must be about children:

> It is also worth noting here that neither the Biblical understanding of marriage nor the written history found in the Hebrew Scriptures suggest a marriage must or even should be about children. Indeed, marriages that prove .infertile are never considered somehow void, even as the pain of infertility is emphasised repeatedly. In other words, the idea that marriage even within the Judaic-Christian worldview holds to the primacy of procreation is erroneous.[154]

4.31 Professor Williams informed the Committee that the Federal Court has rejected arguments that procreation is 'one of the principal purposes of marriage'. [155]

Committee comment

4.32 The Committee notes that a number of Inquiry participants argued against same-sex marriage on the basis that it is detrimental for children to have same-sex parents. In the Committee's view, the argument that same-sex parents do not provide the optimal setting for child-rearing is beyond the terms of reference for this Inquiry. Changes to the law of adoption and legitimacy have already afforded same-sex couples the same or similar rights to opposite-sex couples in this respect.

Historical significance of marriage

4.33 It was commonly argued that it was important to avoid any changes to the meaning of marriage because it has an inherent value derived from its historical and cultural significance.[156] The Salvation Army, Australia Eastern Territory, stated that marriage has existed for thousands of years and its unique meaning as being between a man and a woman should be preserved:

152 Submission 526, p 2.

153 Submission 1167, p 6.

154 Submission 1067, p 3.

155 Submission 90, Attachment 1, p 7.

156 See, eg, Submission 138, p 1; Submission 645, Mr Ian Davie, p 1;

> Marriage … is a great good in itself, and it also serves the good of others and society, as it has done for thousands of years. The preservation of the unique meaning of marriage is therefore not a special or limited interest, but serves the common good, particularly the good of children.[157]

4.34 An alternative historical account put by some stakeholders was that 'marriage' has not always meant only the union of a man and a woman.[158] For example, the Castan Centre for Human Rights Law also pointed to historical understandings of marriage that did not recognise the union as available to only opposite-sex couples:

> The institution of marriage, however, has roots further back in history than the birth of Christianity. Same-sex relationships were integrated into the culture of many societies from which western society sprung, and these relationships appear to have been treated similarly to heterosexual marriages, and generally accepted. This general acceptance and inclusion into societal norms diminished towards the end of the Roman Empire. The banning of same-sex marriage went hand-in-hand with the broader legal limitations imposed on homosexual behaviour, particularly in European society from the 13th century onwards.[159]

Love

4.35 A number of individuals were of the view that ultimately marriage is the recognition of love between two people and accordingly gay and lesbian people should be allowed to marry.[160] Several stakeholders made the simple statement that 'love is love' in expressing their support for same-sex marriage.[161] In another example, Mr Kevin Nguyen said that in his personal view marriage is about love and the sex of the two people involved should not matter:

> To me I define marriage as when you truly love someone that you know you cannot spend a day without them. That is what marriage should be defined as, it doesn't matter if it between two men or two women as long as they love each and knows they can't spend a day without each other then they should be allowed to get married.[162]

4.36 The Committee also heard from parents who were concerned about the rights of their children to marry.[163] One parent, a mother of three, stated that she hopes her daughters will each be able to marry the person that they love regardless of whether that person is male or female:

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157 Submission 823, The Salvation Army, Australia Eastern Territory, p 1.

158 Submission 1215, pp 2-3.

159 Submission 1253, p 5.

160 See, eg, Submission 34, Ms Tracey Martin, p 1; Submission 44, Ms Emma Ford, p 1; Submission 54, name suppressed, p 1; Submission 75, name suppressed, p 1; Submission 80, Miss Emma Donaldson, p 1; Submission 303, Ms Bronwyn Saffin, p 1; Submission 304, D. Cohen, p 1; Submission 460, Mr Kevin Nguyen, p 1.

161 Submission 34, p 1; Submission 44, p 1; Submission 75, p 1; Submission 80, p 1.

162 Submission 460, p 1.

163 Submission 63, name suppressed, p 1; Submission 73, Mrs Janelle Brown, p 1; Mr Thomas, Evidence, 15 March 2013, p 20.

> I am a mother of 3 girls. I am a wife. And that fact that my partner is a man is not important. It's that I love him. We often talk with my girls about the day they may get married, and it is never a discussion about the "man" of their dreams. It is always a discussion about their life partner, boy or girl.
>
> …
>
> I know in my heart that Australia will one day allow Same Sex Marriage because we are that kind of country. The country that believes in equality. I just hope that it will be sooner rather than later.[164]

4.37 Some submission-makers felt that the personal commitment of love for each other through marriage was essentially a private matter and not something upon which the law should intrude:[165]

> Two human beings love for each other, whether they are a man and a woman, a woman and a woman, or a man and a man, has absolutely nothing to do with the way another individual lives their life. It is unrelated and quite frankly none of their business.[166]

4.38 On the other hand, others argued that although predicated on love, marriage means more than this.[167] The John Paul II Institute for Marriage and Family put this as follows:

> Marriage is not just about romance and the love between two people. If the law changes to make legal marriage just about romance, as the proposed redefinition would do, then that will create a moral problem for both ministers of religion and couples who believe in the biological marriage status quo.[168]

Potential harm caused by same-sex marriage to other couples and society

4.39 The Committee received a range of views about whether providing for same-sex marriage would cause any detriment. The fundamental harm that most opponents of same-sex marriage perceived would occur was that the institution of marriage would be undermined.[169] Some individuals and organisations also argued that such a law would necessarily encroach upon freedom of religion.[170]

4.40 A small number of submission-makers argued that dramatic social consequences would result from same-sex marriage including increased violence and paedophilia.[171] The Lutheran Church of Australia referred to possible 'long term social, psychological, economic, religious and

164 Submission 15, name suppressed, p 1.

165 Submission 32, name suppressed, p 1; Submission 37, name suppressed, p1; Submission 54, p 1; Submission 61, Mrs Kathleen Watkinson, p 1; Submission 67, Miss Tina Innes, p 1.

166 Submission 54, p 1.

167 See, eg, Submission 490, p 1; Submission 997, p 5; Submission 1205, p 2.

168 Submission 997, p 5.

169 See, eg, Submission 1131, pp 3-4; Submission 1168, p 1; Submission 1169, Ambrose Centre for Religious Liberty, p 4; Submission 1205, p 2.

170 The Committee considers this argument in Chapter 5.

171 Submission 1077, p 4; Submission 1161, p 24.

political effects of such a radical change to the institution of marriage in Australia' and potential 'unintended damage to the social fabric of our nation.'[172]

4.41 Some participants expressed the view that same-sex marriage would have a significant impact on society. For example, Mr Martin Fitzgerald stated that:

> Changing the definition of marriage to include same-sex partnerships is not a move towards equality in marriage but a deconstruction of what marriage is.[173]

4.42 Referring to same-sex marriage law in other jurisdictions, the NSW Council for Civil Liberties disputed that harm to society or the institution of marriage would flow from such a law:

> The notion that society will be harmed by the change is shown to be false by experience in those jurisdictions where the change has been made. In Canada, in Spain, in nine states in the United States plus the District of Columbia, in South Africa, in the Netherlands, in Argentina, in Iceland, in Mexico, in Norway, in Portugal, in Sweden, in parts of Brazil and in Belgium, the change has taken place without serious problems resulting. There is no threat to the institution of marriage.[174]

4.43 A number of Inquiry participants argued that same-sex marriage would have little impact on people that it does not directly affect.[175] Doctors for Marriage Equality referred to research that found that there are no observable adverse consequences for heterosexual people as a result of same-sex marriage:

> Recent research has shown that the legalisation of same sex marriage has had positive impacts on mental health of non-heterosexual persons living in those communities; and the same research has not shown any negative impacts on heterosexual persons.[176]

4.44 Others agreed with this view, including some opponents of same-sex marriage. For instance, Mr Declan Uluc, a teenager in New South Wales, said that growing up he has come to accept homosexuality. He said he does not support same-sex marriage but if such a law did pass it would neither give him any benefit nor cause him any harm:

> As a teenager myself, growing up in NSW, homosexuality is something that I have gradually grown up with and learnt to accept as the gay community is increasing. I have come to the realisation that homosexuals are humans and deserve to be treated the same as any other human. At the end of the day their lifestyle doesn't really differ from any other person.
>
> I personally do not support gay marriage but whether gay marriage is legalised or not in NSW, it does not benefit me nor does it cause any harm to my life.[177]

172 Submission 1068, p 1.

173 Submission 104, Mr Martin Fitzgerald, p 1.

174 Submission 1215, p 2.

175 See, eg, Submission 29, name suppressed, p 1; Submission 54, p 1; Submission 59, Miss Sarah Doyle, p 1; Submission 72, Mr Luke Vierboom, p 1; Mr Thomas, Evidence, 15 March 2013, p 20; Submission 521a, p 1; Submission 23, Dr Amber Russell, p 1; Submission 1216, p 1.

176 Submission 1050, Doctors for Marriage Equality, p 1.

177 Submission 290, Mr Declan Uluc, p 1.

The role of the Parliament in legislating

4.45 Some stakeholders expressed views about the role of Parliament and what they perceive its responsibilities to be in terms of legislating on same-sex marriage.[178] For instance, the Catholic Archdiocese of Sydney cautioned that it is unwise to make changes to law based on sociological shifts alone:

> It is deeply problematic to draw definitive conclusions from polls or surveys on same-sex marriage that social attitudes to marriage have fundamentally changed. That a particular position is trending sociologically does not necessarily mean it possesses a sound basis in law or philosophy, and it is unwise to make radical changes to the law on a sociological basis alone.[179]

4.46 Professor Geoff Lindell AM, Professorial Fellow, University of Melbourne Law School and Adjunct Professor of Law, University of Adelaide, noted that the law often plays catch-up to changes in society and that Parliament will ultimately have to reflect what the community wants:

> I think we all struggle with change, particularly changes in morals, values and things of this kind. Ultimately, I tend to think that the law lags behind what happens out there in the community. Ultimately, as much as Parliament might put things off, it will have to come around to reflecting what the community wants. At the moment I think there is a strong move afoot in favour of equality.[180]

4.47 In arguing that same-sex couples might enjoy greater acceptance if they could get married, the Australian Psychological Society said that the actions of politicians and other public figures can be an important contributor to social change:

> …research by Matthews and Augoustinos (2012) showed that leadership and support for same-sex marriage from politicians and other public figures is an important contributor to changing attitudes in the general population (and that the latter is important not only to marriage equality debates but to our chances of reducing incidences of violence and their sequalae of poor mental health in [Lesbian, Gay, Bisexual, Transgender] people more broadly.[181]

4.48 The Tasmanian Gay and Lesbian Rights Group argued that the primary responsibility of legislators is to their constituents and if allowing same-sex marriage is of benefit to those constituents then there is an obligation to act:

> We believe the primary duty of legislators is to their constituents. If it is true that allowing same-sex couples to marry will benefit constituents, and we believe it does, it is the task of legislators to pass the required laws.[182]

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178 See, eg, Submission 1163, p 9; Submission 1209, Australian Psychological Society, p 9; Submission 1223, Catholic Diocese of Wollongong, p 1.

179 Submission 1163, p 9.

180 Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Evidence, 6 March 2013, p 34.

181 Submission 1209, p 9.

182 Submission 1160, Tasmanian Gay and Lesbian Rights Group, p 6.

4.49 Mr Thomas, member of Australian Marriage Equality, stated that:

> …why should my son and my family be hurt by a government that purportedly is there to represent them? Without putting too fine a point on it, I went to Vietnam because I believed in this democracy and I was 18 years of age... But I believed passionately in the ideal of what being Australian is all about. We hear it every day, do we not? It is all about equality, mateship—all that sort of stuff. What you are talking about is a group of people who do not want to give this group of people acceptance in their own country.[183]

Social attitudes and health

4.50 Some advocates for same-sex marriage argued that negative social attitudes impact upon the health of gay and lesbian people. They said that if same-sex marriage was to become legal, these social attitudes would likely dissipate and this would lead to health benefits.[184]

4.51 It was contended that the harmful health effects of a lack of adequate relationship recognition for same-sex couples is compounded by the mental health impact of social exclusion.[185] This point was made by the Australian Psychological Society:

> Further compounding the negative impact of a lack of relationship recognition upon same-sex couples is the fact that psychological research has long shown the deleterious mental health impact of social exclusion upon same-sex attracted individuals – what Meyer (2000) terms the 'minority stress hypothesis'. In other words, in a social context in which discrimination occurs in the lives of same-sex attracted individuals, and which for a significant number leads to negative mental health outcomes, for those individuals in couple relationships the mental health risks may be exacerbated by non-recognition of their relationships.[186]

4.52 The Australian Medical Students' Association argued in its submission that stigma and discrimination contribute to poorer health outcomes for LGBTI people including increased risk of substance abuse and mental health problems:

> Discrimination against LBGTI persons, including through exclusion from the right to marry, contributes to the higher rate of psychological morbidity and health inequities experienced by this group… Stigma and discrimination on the grounds of sexual orientation has been found to be associated with mental health problems … and increased risk of substance abuse disorders… Stigma and discrimination are directly tied to risk factors for suicide, including mental illness, isolation, family rejection, and a lack of access to culturally competent care.[187]

4.53 The Australian Psychological Society noted that studies undertaken in the United States showed that there is a connection between banning same-sex marriage and increased

183 Mr Thomas, Evidence, 15 March 2013, p 25.

184 Submission 81, Miss Amanda Galea, p 1; Submission 258, Mr Declan Clausen, pp 1-2; Submission 1207, Australian Medical Students' Association, p 4; Submission 1050, p 1; Submission 1209, p 5.

185 Submission 55, Mr Kyall Shanks, p 1; Submission 73, p 1; Submission 81, p 1; Submission 1209, p 6.

186 Submission 1209, p 6.

187 Submission 1207, p 3.

psychiatric morbidity. It referred to a United States study involving 34,000 participants that made a comparison between psychiatric morbidity in American States where same-sex marriage was legal and where it was illegal. The results found that there were substantially higher numbers of psychiatric incidents among same-sex attracted people in States where same-sex marriage was illegal:

> The substantive increases in psychiatric incidence rates … were only found amongst same-sex attracted individuals who resided in states where legislation banning same-sex marriage was passed, with findings showing:
> - 36.6% increase in mood disorders
> - 248.2% increase in generalised anxiety disorder
> - 41.9% increase in alcohol use disorders
> - a 36.3% increase in psychiatric comorbidity (ie more than one psychiatric disorder).[188]

4.54 Some advocates of same-sex marriage argued that a same-sex marriage law would generate greater acceptance of same-sex relationships and dilute social exclusion of gay and lesbian couples. The Australian Medical Students' Association submitted that 'legalising same-sex marriage will reduce the societal stigma and discrimination experienced by the LGBTI population and improve the health outcomes for this group.'[189]

4.55 Mr Kyle Shanks described the discrimination he has faced and supported same-sex marriage as a mechanism that might make improve community acceptance of homosexuality:

> Coming out in a small area such as my own is a difficult enough ordeal as it is, without having to deal with the bigotry and xenophobia. Going through high school was difficult when some people would make me feel ashamed of how I was born. Even now, in this area, I am afraid to hold my partners hand for fear of the stares and comments we may receive. I am also anxious and nervous telling people we are a couple.
>
> I feel however, that if things did begin to change, even if it was slowly, that more and more people would begin to become more accepting to the idea of homosexuality.[190]

4.56 Other stakeholders took this further and argued that the health benefits would accrue not only to those same-sex couples that marry but also the general community.[191] For example, ACON contended:

> Marriage equality has been shown to have a positive impact on the health of LGBTI communities in the jurisdictions in which marriage has been instituted. This positive impact was not just for those who chose to marry, but to the community more broadly.[192]

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188 Submission 1209, p 6.

189 Submission 1207, p 4.

190 Submission 55, p 1.

191 Submission 258, p 2; Answers to questions on notice taken during evidence 15 March 2013, Mr Nicolas Parkhill, Chief Executive Officer, ACON, Questions 1 and 2, p 2.

192 Answers to questions on notice taken during evidence 15 March 2013, Mr Parkhill, Questions 1 and 2, p 2.

4.57 However, not all health-care providers were supportive of same-sex marriage. Dr Peter Keith, a general practitioner of medicine, made the following submission:

> As a practising GP and a practising Christian I have to say that biologically and theologically marriage is intended for male/female, not for male/male relationships.[193]

4.58 Mr Nicolas Parkhill, Chief Executive Officer, ACON told the Committee that improved health outcomes are interconnected with recognition of human rights.[194] The Committee considers arguments for and against same-sex marriage in terms of individual legal rights in the next Chapter.

Committee comment

4.59 In the Committee's view it is evident that the social meaning of marriage has changed over time. The availability of no-fault divorce, the ban on marriage as a defence to rape and other changes to the law were made to reflect developments in community understanding about what marriage should and should not be.

4.60 The Committee is equally certain that public perceptions about gay and lesbian relationships have changed markedly in recent decades. Greater legal recognition of same-sex relationships through amendments to discrimination law are particularly strong evidence of this shift.

4.61 We appreciate that the social and legal meanings of words are often symbiotic. Changes to the law can send a message to the community about acceptable and unacceptable behaviour and about legitimacy and acceptance.

4.62 At the same time, we recognise that for some people in New South Wales the word 'marriage' holds personal and religious significance and that allowing same-sex couples to marry would run contrary to what 'marriage' means to them, and there is still a strong view in the community that marriage is very closely linked to procreation and the founding of a family.

193 Submission 313, p 1.

194 Mr Nicolas Parkhill, Chief Executive Officer, ACON, Evidence, 15 March 2013, p 28.

Chapter 5 Individual legal rights and marriage

In making their case for or against same-sex marriage, a number of Inquiry participants focused on the Government's legal obligations to uphold individual rights. Some stakeholders considered that denying same-sex couples the right to marry was a violation of human rights obligations, including rights to equality and non-discrimination as well as the right to marry. Several Inquiry participants emphasised that there is an important distinction to be made between the civil institution of marriage and the religious sacrament of marriage. Others felt that freedom of religion could be eroded if same-sex marriage was permitted and that people who objected to same-sex marriage might be discriminated against. This Chapter canvasses each of these claims.

Equality and non-discrimination

5.1 A frequent contention made throughout this Inquiry was that the failure to provide for same-sex marriage amounts to unlawful discrimination against gay and lesbian people in violation of legal rights to non-discrimination and equality.[195]

The law

5.2 The Committee was informed that international law, including human rights law, applies not only to the Federal Government but to all jurisdictions within Australia, including New South Wales.[196]

5.3 The rights to equality and non-discrimination are enshrined in articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). They are also contained in a series of other international human rights instruments to which Australia is a party.

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195 Submission 1083, Parents and Friends of Lesbians and Gays, p 6; Submission 1162, Women's Legal Services NSW, p 2. Indeed, 'equality' was highlighted by many stakeholders as the foremost justification for the enactment of same-sex marriage law: See, eg, Submission 29, name suppressed, p 1; Submission 30, Miss Maddison Pesgrave, p 1; Submission 31, name suppressed, p 1; Submission 33, name suppressed, p 1; Submission 34, Ms Tracey Martin, p 1; Submission 35, Ms Abby Constable, p 1; Submission 36, Mr Adam Bruce, p 1; Submission 37, name suppressed, p 1; Submission 39, name suppressed, p 1; Submission 40, name suppressed, p 1; Submission 41, name suppressed, p 1; Submission 42, Ms Melanie Isaacs, p 1; Submission 52, Mr Michael Robinson, p 1; Submission 53, name suppressed, p 1; Submission 54, name suppressed, p 1; Submission 58, name suppressed, p 1; Submission 64, Ms Madelaine Sweeney-Nash, p 1; Submission 66, name suppressed, p 1; Submission 67, Miss Tina Innes, p 1; Submission 71, name suppressed, p 1; Submission 74, Miss Chelsea Gunner, p 1; Submission 76, Mrs Jen Geddes-Davies, p 1; Submission 77, Mr Stuart Widdison, p 1; Submission 78, Mr Kieran Revell-Reade, p 1; Submission 83, Mr Alan Barnes, p 1; Submission 92, Ms Belinda Kerr, p 1; Submission 538, Ms Vida Carden-Coyne, p 1; Submission 1070, Australian Federation of Civil Celebrants, p 1; Submission 1162, p 1; Submission 1210, University of Sydney Students' Representative Council, p 1; Submission 1218, Engage Celebrants, p 1.

196 Submission 1041, Australian Lawyers for Human Rights, p 2.

5.4 In essence, the rights to equality and non-discrimination provide that everybody is equal before the law and deserving of the same legal protection. The Australian Human Rights Commission explained that these rights means that people are protected from discrimination in relation to how the law is enforced against them and also in relation to the content of the law itself:

> The right to equality before the law guarantees equality with regard to the enforcement of the law. The right to the equal protection of the law without discrimination is directed at the legislature and requires State Parties to prohibit discrimination and take action to protect against discrimination.[197]

Equality and non-discrimination and the status quo

5.5 In a statement echoing the sentiment of many others,[198] Parents and Friends of Lesbians and Gays alleged that the failure to provide for same-sex marriage discriminates against gay and lesbian people on the basis of sexual orientation:

> 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.[199]

5.6 For the same reason, the Australian Human Rights Commission asserted that marriage ought to be available to same-sex couples:

> The principle of equality requires that any formal relationship recognition available under law to opposite-sex couples should also be available to same-sex couples. This includes civil marriage.[200]

5.7 The Castan Centre for Human Rights Law concurred and argued that any legal recognition of same-sex relationships other than marriage is not enough to remedy this discrimination:

> …the Castan Centre argues for the recognition of same-sex marriage on the simple premise that the prohibition represents unlawful discrimination. Creating a similar institution for homosexual couples e.g. civil unions, that provided them with equivalent rights, would not remove the discrimination. As Justice Lafome, of the Ontario Supreme Court, has noted: 'any "alternative" to marriage … simply offers the insult of formal equivalency without the promise of substantive equality."[201]

5.8 The Castan Centre further argued that the creation of separate legal institutions for same-sex couples as distinct from heterosexual couples is reminiscent of the 'separate but equal' policy maintained in the United States during segregation.[202]

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197 Submission 1255, Australian Human Rights Commission, Appendix 1, p 3.

198 See footnote 1 above.

199 Submission 1083, p 6.

200 Submission 1255, Appendix 1, p 3.

201 Submission 1253, Castan Centre for Human Rights Law, p 14; see also Submission 1162, p 2.

202 Submission 1253, p 14.

5.9 Other stakeholders submitted that arguing for same sex marriage on the basis of equality and non-discrimination then opens the question anyone else who is not allowed to marry to make the same argument.

5.10 Some stakeholders disputed that declining to recognise same-sex marriage is discriminatory.[203] Mr Neil Foster and the National Marriage Coalition made the case that confining marriage to a union only that between a man and a woman is not discriminatory because anyone can choose to marry someone of the opposite sex:[204]

> It is not discriminatory because they are proposing to do something that does not meet the description of the relationship that currently exists. The law does not, as is sometimes said, discriminate against homosexuals. Whatever a person's sexuality, they are allowed if they otherwise meet the legal requirements, to marry someone of the opposite sex. But to allow someone to "marry" someone of the same sex is to create a relationship that is not marriage.[205]

5.11 A similar point was made by Mr Anthony Thompson, a member of Lawyers for the Preservation of the Definition of Marriage. He referred to a recent Federal Court case in which the applicant sought a finding of unlawful discrimination on the basis that he had suffered discriminatory treatment by being unable to register a marriage between two people of the same sex.[206] The case was subsequently dismissed, and it was found that discrimination on the basis of sex[207] did not arise because the treatment of people of different sexes was the same.[208]

5.12 The Committee notes that at the time this case was decided, discrimination on the basis of *sexual orientation* was not provided for in the *Sex Discrimination Act 1984* and as such was not arguable by the plaintiffs in this case. On 25 June 2013 the Commonwealth *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* became law. The Act provides for new categories of discrimination not previously available in Australian law. Discrimination on the grounds of sexual orientation, gender identity and intersex status are now expressly forbidden under Commonwealth law. However, there is an exemption for anything done in compliance with the Commonwealth Marriage Act.[209]

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203 Submission 721, Mr Neil Foster, p 5; Submission 723, Mr Patrick Doyle, p 1; Submission 800, Mr Kevin Harper, p 1; Submission 1131, Knights of the Southern Cross, p 1; Submission 1169, Ambrose Centre for Religious Liberty, pp 6-7; Submission 1205, NSW Council of Churches, p 4; Submission 1223, Catholic Diocese of Wollongong, p 1.

204 Submission 721, Mr Neil Foster, p 5; Submission 1040, National Marriage Coalition, p 9.

205 Submission 721, p 5.

206 *Margan v President, Australian Human Rights Commission* [2013] FCA 109.

207 Cf sexuality. Discrimination on the basis of sexual orientation was prohibited by legislative amendment in June 2013 but does not apply to matters done in accordance with the *Marriage Act 1961* (Cth).

208 Mr Anthony Thompson, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, p 29.

209 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* s 52; Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [74], 21.

Same-sex marriage as a mechanism for diluting existing discrimination

5.13 Some stakeholders contended that a law for same-sex marriage would dilute the social discrimination that gay and lesbian people face in their daily lives. [210] In his evidence to the Committee, Mr Rodney Croome AM, National Convenor, Australian Marriage Equality, said that as long as same-sex marriage is not permitted then the stereotype of same-sex relationships as unstable and entirely sexual continues to permeate within the community:

> As long as we say through the law, effectively, that same-sex partners cannot marry, we are saying that the relationships those partners have do not conform with what we understand a marriage to be. And we understand a marriage to be about lifelong commitment, taking responsibility, sharing the joys and the sacrifices and the responsibilities of that union. That reinforces stereotypes of same-sex relationships as short lived, as entirely sexual, as unstable and all of those old stereotypes of same-sex relationships which are dying away now but still find a refuge behind the failure of the law to recognise that we too can have long-term, loving, stable relationships.[211]

5.14 Elsie Women's Refuge submitted that discrimination enshrined in law entrenches discriminatory attitudes and that social discrimination against lesbian, gay, bisexual and transgender people has other associated negative consequences, some of which it has direct experience of:

> We also work with women who suffer from mental health issues that are exacerbated by existing discriminations against [lesbian, gay, bisexual and transgender] people. In the work that we do, there is already a social stigma attached to same-sex domestic violence which impacts negatively on domestic violence victims. Legal discrimination serves to further entrench these outdated cultural attitudes. We would strongly encourage the removal of any discrimination against these women and any impediments to forming a loving and committed relationship.[212]

5.15 A central tenet of the claim that the current situation is discriminatory is that marriage, as regulated in law, is a civil institution that creates legal rights and obligations that are separate from religion.

The distinction between marriage as a civil and religious institution

5.16 A number of stakeholders argued that there is an important distinction to be made between the civil institution of marriage and the religious sacrament of marriage.[213] It was argued that

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210 Submission 56, Mr Alan Colletti, p 1; Submission 1255, Appendix 1, p 3; Submission 1083, p 7.

211 Mr Rodney Croome AM, National Convenor, Australian Marriage Equality, Evidence, 15 March 2013, p 23.

212 Submission 624, Elsie Women's Refuge, p 1.

213 Submission 8, Mr Jayden Mooy, p 1; Submission 12, Ashlee Ferret, p 1; Submission 43, name suppressed, p 1; Submission 59, Miss Sarah Doyle, p 1; Submission 89, Ms Roanna Harris, p 1; Submission 624, p 1; Submission 931a, NSW Bar Association, p 1; Submission 1083, p 15; Submission 1121, Australian Lawyers Alliance, p 2; Submission 1216, Atheist Foundation of Australia Inc, p 1; Submission 1257, Mr Christopher Puplick AM and Mr Larry Galbraith, p 18; Submission 1214, Organisation Intersex International Australia Limited, p 2.

law, as a civil institution, must be non-discriminatory in its operation and that marriage law is and should be distinct from marriage as a religious sacrament.[214]

5.17 In making this point, the NSW Bar Association restated the principle that the Government should be non-discriminatory in its regulation of people's conduct. It submitted that discrimination on the basis of sexuality is fundamentally wrong and that if marriage is to be restricted to a union between one man and one woman, then that should occur privately and not under the law. The Association concluded that the law should recognise a union that treats everyone equally:

> 1. In regulating conduct, Government should treat its citizens in a non-discriminatory fashion;
>
> 2. Discriminating on the basis of sexual preference is fundamentally wrong;
>
> 3. If Government is going to regulate human relationships then it should be non-discriminatory with all civil unions between consenting adults being treated equally and being recognised by Government; and
>
> 4. If for historical and cultural reasons marriage is to be restricted to union between a woman and a man then that should be a form of union under the auspices of private institutions (such as churches) with Government recognising one non-discriminatory form of relationship and treating all citizens equally.[215]

5.18 Similarly, the Australian Lawyers Association were of the view the debate about same-sex marriage has been distorted by religious arguments and that as a civil institution the law has an obligation to treat people equally. It observed that private institutions are free to recognise unions in their own way:

> The ALA [Australian Lawyers Alliance] acknowledges that much of the debate regarding same sex marriage in Australia is coloured by the association of marriage with religion and the historically and culturally embedded notion that marriage is to be restricted to a union between a man and a woman. However, the ALA submits that the reality is that marriage laws in Australia are governed by civil law, and as such, should treat all citizens equally. There is nothing preventing private institutions from continuing to solemnise and recognise, in their own way, those unions they choose to accept or acknowledge for cultural or religious reasons.[216]

5.19 The NSW Gay and Lesbian Rights Lobby also made the connection between marriage as a civil institution and the human right to non-discrimination:

> The GLRL is of the view that these developments, including the passage of marriage equality legislation and moves to introduce marriage equality legislation in other jurisdictions, reflect a recognition of the notion that marriage is a civil institution and the accordant importance of equal access to the institution of marriage as a human rights issue, with the right to non-discrimination, as enshrined in the International

214 Submission 931a, p 1; Submission 1121, p 2; Submission 1166, NSW Gay and Lesbian Rights Lobby, p 5; Submission 1216, p 1.

215 Submission 931a, p 1.

216 Submission 1121, p 2.

> Covenant on Civil and Political Rights (ICCPR), constituting a central consideration in contemporary political debate(s) on the issue.[217]

5.20 Some individuals also wrote to the Committee frustrated at what they perceived to be an in unacceptable intrusion of religion into law.[218] In his submission, Mr Jayden Mooy posed the following questions:

> People don't allow [same-sex marriage], because of religion. I thought religion and state were meant to be separate entities? Why aren't they in this case? What gives these circumstances the right to break the rules?[219]

5.21 Drawing comparisons with same-sex marriage law in New Zealand, the NSW Gay and Lesbian Rights Lobby observed that the New Zealand law expressly provides that its purpose is to provide for civil marriage, distinct from any religious interpretation. The submission quoted from the Committee report that led to the New Zealand legislation:

> Recognising that marriage is a civil, and not a religious, institution, the majority report further asserted: "The Marriage Act enables people to become legally married; it does not ascribe moral or religious values to marriage".[220]

5.22 Others felt that marriage was quite rightly connected to religion and objected to any trend towards the law recognising only the legal consequences of marriage. For example, the Organisation of Rabbis Australasia asserted that Australian law quite rightly recognises the religious significance of marriage:

> In some other jurisdictions, in other parts of the world, the recording of a marriage is purely a civil matter totally unrelated to the performance of a ceremony by a minister of religion. The certificate of marriage does not mention how the marriage took place. However our Marriage Act rightly, and to the contrary, provides for marriage to be performed by a Minister of Religion, and the fact that the marriage was performed according to the rites of that particular religion are recorded on the certificate of marriage.
>
> This is all without doubt in recognition of the fact that in our society the institution of marriage has its roots in the deeply held religious conviction of the Judaeo-Christian ethic.[221]

Discrimination against objectors to same-sex marriage

5.23 Several Inquiry participants were worried that if same-sex marriage were to become law, this would exacerbate discrimination against people who object to same-sex marriage on religious

217 Submission 1166, p 5.

218 Submission 8, p 1; Submission 54, name suppressed, p 1; Submission 12, p 1; Submission 43, p 1; Submission 59, p 1; Submission 89, p 1.

219 Submission 8, p 1.

220 Submission 1166, p 5.

221 Submission 1251, Organisation of Rabbis Australasia, p 2.

grounds.[222] The Catholic Archdiocese of Sydney cautioned that Catholics and people of other faiths might be discriminated against if they refused to solemnise same-sex marriages:

> In jurisdictions which have changed or are changing the definition of marriage, individuals, schools and churches have already been subject to legal action and/or investigation because of their belief in marriage as a union of a man and a woman. Qualified people have been deemed unfit for public office or even to practise in their professions because they hold a personal belief that marriage is between a man and a woman. Persons have suffered economic disadvantage or had their businesses targeted for boycott and trade restrictions because of their belief in marriage. These developments are of tremendous concern. The full legal and social consequences of same-sex marriage are only beginning to unfold, but the evidence of their impact is deeply disheartening.[223]

5.24 These matters were connected to the right to religious freedom which some stakeholders contended would be curtailed if same-sex marriage was to become law, as outlined in the next section.[224]

The right to religious freedom

5.25 A number of Inquiry participants held the view that the human right to freedom of religion could be inhibited by a law to provide for same-sex marriage.[225]

5.26 Freedom of religion is one of very few rights granted specific protection by the Australian Constitution. It prohibits the government from establishing a religion, from imposing any religious observance on people, and from prohibiting the free exercise of any religion.[226] The right to religious freedom is also enshrined in Article 18 of the ICCPR which provides among other things that 'everyone shall have the right to freedom of thought, conscience and religion'.[227]

5.27 As outlined in Chapter 2, same-sex marriage legislation in New Zealand, Canada and the United Kingdom does not compel celebrants or ministers of religion to solemnise same-sex marriage. Similar models have been proposed in Australia.

5.28 However, some objectors to same sex marriage felt that a legal provision stipulating that ministers of religion are not obligated to solemnise same sex marriages did not provide adequate protection of their right to religious freedom. For example, the Endeavour Forum Inc. wrote in its submission:

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222 See, eg, Submission 1163, Catholic Archdiocese of Sydney, p 8; Submission 588, Ms Jennifer Avenell, p 1.

223 Submission 1163, p 8.

224 See, eg, Submission 1049, The Episcopal Assembly of Oceania, p 1; Submission 1252, Protect Marriage Australia, p 9; Submission 1206, Association of Baptist Churches NSW and ACT, p 3; Pro forma D (146 received).

225 See, eg, Submission 1049, p 1; Submission 1169, p 3; Submission 1252, p 9; Submission 1205, p 5; Submission 1206, p 3; Pro forma D (146 received).

226 *Constitution Act 1902* s 116.

227 Article 18.

> "Exemptions" for religious bodies would be only of a temporary nature, and easily abolished. Moreover every citizen, religious or otherwise, has a right to freedom of conscience.[228]

5.29 The Catholic Archdiocese of Sydney agreed that providing for same-sex marriage could erode religious freedoms and expressed concern that eventually religious organisations would be compelled to perform same-sex marriages anyway:

> Catholics and other faith communities could eventually be compelled to recognise same-sex marriage in their schools, charitable, aged care and adoption services, or suffer the consequences of social and legal exclusion.[229]

5.30 The Lutheran Church of Australia argued that same-sex marriage contradicts religious teachings and that if it were made legal it would effectively impose ideology on the church:

> The legislation [to legalise same-sex marriage] would violate the separation between church and state by imposing a definition of marriage on the church that contradicts the teaching of the church on sexuality and marriage. The state would thereby make a decision on what is, for many of its citizens, a religious matter. The separation between church and state means that just as the church does not impose its theological teachings on the state, the state does not impose its ideology on the church.[230]

5.31 The Metropolitan Community Church Sydney (the MCC) took a different view on freedom of religion in the present context. It submitted that there are divergent approaches to marriage within the Christian faith and contended that its right to freedom of religion is curtailed by the status quo because the law does not permit it to solemnise same-sex marriages:

> Freedom of religion is a vital concern when it comes to marriage equality as not all Christians hold the same view regarding who they will marry. Rather there is a great divergence of beliefs among Christians when it comes to marriage. Some Christian churches only marry those who are members of their church. Some Christian churches will marry people who have been divorced while others will not. If legal some Christian churches will marry same-sex couples while others will choose not to. MCC [The Metropolitan Community Church] Sydney supports the rights of all churches to practice their faith…
>
> Not all churches are currently allowed to practice their faith freely… We at MCC Sydney strongly believe in the holy rite of marriage for all couples yet we are forbidden by Australian law to practice this aspect of our faith for our members and friends who are in same-sex relationships. The fight for Marriage equality is not solely a secular social justice issue. For MCC Sydney it is also a religious freedom issue.[231]

5.32 Advocates for same-sex marriage understood that no one should be compelled to solemnise a marriage that would contradict their personal beliefs. In a statement typical of many, Mr Christopher Puplick AM and Mr Larry Galbraith supported the right of ministers of religion to perform marriages in accordance with their faith traditions and argued for legislation that

228 Submission 996, Endeavour Forum Inc, p 2.

229 Submission 1163, p 7.

230 Submission 1068, Lutheran Church of Australia, p 1.

231 Submission 675, Metropolitan Community Church Sydney, p 1.

would make room for them to refuse to make their places of worship available for the solemnisation of same-sex marriage:

> We acknowledge the significance of marriage in many faiths and support their right to continue to perform marriages according to their teachings and rituals. We equally support the right of the various faiths to determine who they marry and in what circumstances. The Marriage Act 1961 guarantees these rights. These rights can easily be guaranteed in any state-based law providing for marriage equality. Indeed, these guarantees may be extended by stating that Ministers of Religion are not required to make places of worship under their control available for the solemnisation of same-sex marriage.[232]

5.33 Mr Puplick and Mr Galbraith claimed that those who object to the exemption may have failed to consider the distinction between marriage as a religious sacrament and the civil institution of marriage as recognised by law[233] (as discussed at paragraphs 5.16 to 5.22 above).

The right to marry

5.34 The right to marry is enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 23 of the ICCPR recognises the family as the 'natural' and 'fundamental' group unit and stipulates that 'the right of men and women of marriageable age to marry and found a family shall be recognised'. It does not define the words 'marriage' or 'family'.

5.35 The Castan Centre for Human Rights Law argued in its submission that Article 23 of the ICCPR is 'ambiguously-worded'. The Centre further contended that it would likely be interpreted in line with changes in social attitudes and in accordance with the other protections the Convention affords, including rights to equality and non- discrimination:

> In international law, it is likely that this change in societal attitudes will be reflected in a move away from the reliance on the traditional interpretation of the right to marriage in the ambiguously-worded Article 23 of the ICCPR, in favour of an interpretation which opens the institution of marriage to all couples, in line with the anti-discrimination provisions of the ICCPR and other international instruments.[234]

5.36 Australian Lawyers for Human Rights and others in favour of same-sex marriage reasoned that the right to marry exists "not to protect heterosexual marriage but to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage".[235]

5.37 Other stakeholders disagreed with this interpretation. For example, the Catholic Archdiocese of Sydney advocated that the NSW Government uphold human rights but contended that the right to marry enshrines a right exclusive to heterosexual unions due to the implicit interconnection in the Convention between the right to marry and founding a family:

232 Submission 1257, p 18.

233 Submission 1257, p 18.

234 Submission 1253, p 30.

235 Submission 1041, p 2; See also Submission 1257, p 32.

> The State of New South Wales needs to acknowledge and respect the obligations Australia has entered into by signing and ratifying the principal international human rights covenants. The "right to marry and found a family" is affirmed by the Universal Declaration of Human Rights (1948) and international law has always recognised the enduring truth that marriage is a union of a man and a woman oriented to the procreation and nurturing of children. The United Nations Human Rights Committee, for example, which monitors international human rights treaties, has stated that the right to marry "implies, in principle, the possibility to procreate".
>
> The right to marry is a fundamental human right, but it is a unique kind of right - a right that a man and a woman can only fulfil through each other.[236]

Committee comment

5.38 The Committee recognises the importance of adhering to the principles espoused in international human rights law. Rights to non-discrimination and equality are just as important as the right to religious freedom and, as always, these rights must be balanced. To this end, if a law to permit same-sex marriage law was passed in New South Wales, the Committee sees merit in an approach that would exempt ministers of religion and celebrants from solemnising such marriages if to do so would contradict their personal or religious beliefs.

5.39 The Committee acknowledges the distinction between marriage as a religious and civil institution and believes that the law should be non-discriminatory in its operation. We note that amendments to the Commonwealth Sex Discrimination Act have made discrimination on the basis of sexual orientation unlawful except as provided for in the Marriage Act. In the Committee's view, this exception effectively acknowledges that the current operation of the Marriage Act is discriminatory.

[236] Submission 1163, p 4.

Chapter 6 Can New South Wales legislate for same-sex marriage and would the law be valid?

This Chapter describes the legal framework for marriage in Australia. It finds that New South Wales can legislate on the subject of marriage but there remain some legal questions about whether a law for same-sex marriage would be operative. The bulk of this Chapter is dedicated to considering these issues.

The Committee heard contrasting legal arguments about whether there would be inconsistencies between a state law for same-sex marriage and the Commonwealth *Marriage Act 1961*, and was advised what the consequences of inconsistency might be. To conclude, the Chapter describes how a legal challenge to same-sex marriage legislation might come about, the possible outcomes of a High Court decision and its consequences for the law.

History of marriage in Australia

6.1 Prior to the establishment of the Commonwealth of Australia in 1901 marriage in the Colony of New South Wales was regulated by legislation and regulation including ordinances. Colonial statutes dealing with divorce and marriage were subject to disallowance by the Imperial Parliament.

6.2 The issues of marriage and divorce were considered in some detail during the Constitutional Conventions that were conducted in the 1880s and 1890s prior to Federation.

6.3 In 1959 the Commonwealth Parliament considered and passed the Matrimonial Causes Act. The passing of this legislation preceded the codification of national marriage laws.

The Commonwealth Marriage Act 1961

6.4 In May 1960 the then Commonwealth of Australia Attorney-General, Sir Garfield Barwick introduced into the House of Representatives the Marriage Law Bill. Debate on the Bill was not concluded in 1960 and it was re-introduced in 1961. The unification of the marriage laws in Australia saw nine separate legislative arrangements brought into a single national framework. The Marriage Act 1961 (hereafter 'the Marriage Act') received Royal Assent on 6th May 1961.

6.5 Among other things, the Marriage Act provides for the steps that must be taken to solemnise a valid marriage.[237] These include that the ceremony must be conducted by an authorised celebrant,[238] that each party to the marriage must make a statutory declaration stipulating certain specific matters and that there must be at least two witnesses to the ceremony. In addition, as part of the ceremony the authorised celebrant is required to tell the parties that

237 *Marriage Act 1961* (Cth) Pt IV Div 2.

238 Section 5 of the *Marriage Act 1961* (Cth) defines 'authorised celebrant' to include a minister of religion or a marriage celebrant.

'marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others voluntarily entered into for life'.[239]

6.6 The Marriage Act also declares void marriages between close relatives, bigamous marriages and marriages where there is no real consent.[240] The NSW Bar Association observed that '[t]he exhaustive grounds on which marriages are void … do not mention the partners being of the same sex.'[241]

6.7 The original Marriage Act of 1961 did not define the term 'marriage'. It was not until 2004 that amendments were made to define 'marriage', for the purposes of the Marriage Act, as 'the union of a man and a woman to the exclusion of all others voluntarily entered into for life'.[242] This definition of 'marriage' is derived from the common law and reproduces the words of Lord Penzance in an 1866 decision of the United Kingdom Courts of Probate and Divorce.[243] In Chapter 2, the Committee canvassed the circumstances within which the 2004 amendments came about.

6.8 As well as the definitional change, the 2004 amendment also inserted words into the Marriage Act to specifically exclude recognition in Australia of same-sex marriages solemnised overseas.[244]

6.9 In relation to the 2004 amendments, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, expressed the view that:

> Whatever may have been the position before, there can be no doubt that the *Marriage Act* as amended now manifests a clear intention not to recognise same-sex marriages *as marriages,* whether entered into in Australia or in any other country.[245]

6.10 That being said, in legal advice to the NSW Department of Attorney-General and Justice, Mr David Jackson AM QC noted that:

> In circumstances when "marriage" is defined as being the union of a man and a woman, there could not be a more obvious impediment to solemnising a marriage than that the parties are of the same sex.[246]

6.11 In paragraphs 6.38 to 6.43 below, the Committee canvasses stakeholder disagreement as to whether the 2004 amendments have removed any possibility of providing for same-sex marriage under state law.

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239 Submission 1240, Department of Attorney General and Justice, p 5; *Marriage Act 1961* (Cth) s 5.

240 *Marriage Act 1961* (Cth) s 23B.

241 Submission 931, NSW Bar Association, p 2.

242 *Marriage Act 1961* (Cth) s 5.

243 *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 [UK Courts of Probate and Divorce].

244 *Marriage Act 1961* (Cth) s 88EA.

245 Submission 103, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, p 4.

246 Submission 1240, p 7.

Can New South Wales pass legislation about marriage?

6.12 Legal experts who gave evidence to the Committee (both for and against same-sex marriage) agreed that the New South Wales Parliament possesses the unqualified power to legislate on the subject of marriage.[247] The following section outlines briefly why this is so.

The State's power to legislate for marriage

6.13 The Australian Constitution prescribes the powers of the Federal Parliament. It grants two types of powers. Section 52 provides the Federal Parliament with *exclusive* power over various matters. Section 51 grants the Federal Parliament powers that it holds *concurrently* with the Australian states. The power to regulate marriage is contained in section 51 of the Australian Constitution and is therefore a power held by both the Commonwealth and the states.[248] Professor Lindell, for example, was clear in his evidence that the power to regulate marriage is not exclusive to the Commonwealth:

> At the outset it can be stated with confidence that there is nothing to suggest that the power of the Commonwealth Parliament to make laws with respect to marriage under s 51(xxi) is either explicitly or impliedly exclusive.[249]

6.14 Furthermore, any powers not touched on by the Constitution residually lie with the states.[250] Unlike the Federal Parliament, the matters about which state parliaments can legislate are not defined by particular subject matters outlined in the Australian Constitution. Instead, the New South Wales *Constitution Act 1902* provides for the plenary power of the NSW Parliament to legislate generally for the 'peace, welfare and good government of the State.'[251] There is no doubt that this power is sufficiently broad to permit New South Wales to enact laws to recognise same-sex marriage.[252] However, this is subject to any limitations provided for in the Australian Constitution. [253]

6.15 In his evidence to the Committee Professor George Williams AO, Professor of Law at the University of New South Wales, observed that the issue of a state based law for same-sex

247 Submission 90, Professor George Williams AO, p 1; Submission 102, Professor Parkinson, p 3; Submission 103, Attachment 1, p 3; Submission 622, Professor Anne Twomey, Professor of Law, University of Sydney, p 1; Submission 1240, p 3; Submission 1256, Law Society of New South Wales, pp 2-3.

248 See, eg, Submission 103, Attachment 1, p 3.

249 Submission 103, Attachment 1, p 3.

250 Submission 1240, p 3 (referring to section 107 of the Australian Constitution); Submission 1215, NSW Council for Civil Liberties, p 4.

251 *Constitution Act 1902* s 5; Submission 1222, NSW Society of Labor Lawyers, p 3.

252 Submission 103, Attachment 1, p 2; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9; Submission 1215, p 4.

253 Answers to supplementary questions 6 March 2013, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Question 5, p 4.

marriage was 'bedevilled' by 'misconceptions' and reaffirmed the state power to legislate in respect of marriage:[254]

> … I have not come across a debate for some time that is so bedevilled by misconceptions… The view had taken hold that State parliaments have no capacity to legislate in these fields and those views shape public debate in a really unfortunate way. There is a legitimate policy question for State parliaments in this area.[255]

6.16 Indeed many submissions illustrated a misunderstanding of the law. A large number of Inquiry participants, for example, were under the misapprehension that marriage had been defined in the Constitution, which it has not.

Would a New South Wales same-sex marriage law be constitutionally operative?

6.17 While all experts agreed that New South Wales has the power to legislate in relation to marriage, they similarly agreed, however, that the real issue to be considered is whether a state same-sex marriage law would be inconsistent with the Commonwealth Marriage Act. Section 109 of the Constitution provides that where Commonwealth and state law on the same subject matter conflict, the Commonwealth law shall prevail to the extent of the inconsistency:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[256]

6.18 Whether there is inconsistency between state and Commonwealth law for the purpose of section 109 is something that can only be conclusively determined by the High Court of Australia. If the High Court finds that a state law and a Commonwealth law are inconsistent for the purpose of section 109, this does not mean that the State lacked the power to pass the law in the first place. Although section 109 uses the word 'invalid', a state law that was found to be inconsistent with a federal law would actually be *inoperative* until such time as the inconsistency ended (for example where the Commonwealth law is repealed).[257]

6.19 The fundamental question with regard to a possible same-sex marriage law in New South Wales is thus not whether the State has the power to legislate but rather, if it did so, would that law be operative. More specifically, would the enactment of a New South Wales same-sex marriage law conflict with the Commonwealth Marriage Act, thus rendering the NSW law inoperative.

6.20 Inconsistency between a Commonwealth and a state law can be either direct or indirect. A direct inconsistency will arise where a state law and a Commonwealth law contradict one another. An indirect inconsistency occurs where the Commonwealth law 'covers the field' in

254 Professor George Williams AO, Professor of Law, University of New South Wales, Evidence, 6 March 2013, p 15; Submission 90, Attachment 1, p 3.

255 Professor Williams, Evidence, 6 March 2013, p 15.

256 *Australian Constitution* s 109.

257 See, eg, Submission 90, Attachment 1, p 127; Submission 103, Attachment 1, p 4; Submission 623, Lawyers for the Preservation of the Definition of Marriage, p 2; Submission 1254, Inner City Legal Centre, p 3.

relation to a particular subject matter.[258] Professor Lindell explained the forms of inconsistency as follows:

> For the purposes of [section] 109 of the Constitution, inconsistency can assume at least two forms. The first kind involves a contradiction between Commonwealth and State laws and is known as 'direct inconsistency'. The second, known as 'indirect inconsistency', arises when the Commonwealth law covers the (metaphorical) field so as to indicate the intention of that law to be the only law to operate in that field regardless of whether there is any contradictions between the two laws.[259]

6.21 Professor Williams advised the Committee that inconsistency will not automatically arise, that is, it is not the case that a state-based same-sex marriage law *must* give rise to inconsistency:

> In any event, my view is that there is no inconsistency between the federal *Marriage Act* and a carefully-drafted state same-sex marriage law. There is certainly room for debate about this issue. It is a myth, however, to suggest that a state law *must* be inconsistent. Rather, there is no answer to this question until the High Court provides one.[260]

6.22 The next few sections explore stakeholder views on whether any direct or indirect inconsistencies arise between a state same-sex marriage law and Commonwealth legislation. The issues are legally complex and ultimately can be determined only by the High Court of Australia.

Indirect inconsistency: Does the Marriage Act 'cover the field' of marriage in Australia?

6.23 As previously noted, the Australian Constitution prescribes the powers of the Federal Parliament. For the purposes of section 109 of the Constitution, an indirect inconsistency can arise where it is the intention of the (Commonwealth) legislation that it should be the only law to operate on a given topic. The question that is asked in this regard is whether the Commonwealth legislation intended to 'cover the field'.

6.24 Lawyers and academics who participated in this Inquiry agreed that the Commonwealth Marriage Act covers the field with respect to marriage between partners of the opposite sex.[261] However, it is less clear whether the 'field' that the Marriage Act covers includes marriage between partners of the same sex. If it does, then the jurisdiction of the states to legislate in this area is effectively ousted by the Commonwealth law. If the Marriage Act covers only the field of opposite sex marriage, then it may be open to the states to legislate for same-sex marriage.

6.25 The resolution to this legal matter partly depends upon the meaning of the word 'marriage' in the Constitution. The section below considers what the word 'marriage' means for the purposes of the Constitution, then the next section canvasses stakeholder opinions about whether the Marriage Act 1961 covers the field of marriage.

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258 Submission 90, Attachment 1, p 11.

259 Submission 103, Attachment 1, p 4.

260 Submission 90, Attachment 1, p 11.

261 Submission 103, Attachment 1, p 4; Submission 90, Attachment 1, p 14; Submission 1240, p 7.

Does the Commonwealth have the power to regulate same-sex *marriage? The meaning of the word 'marriage' in the Constitution*

6.26 The word 'marriage' for the purposes of the Constitution has not been defined. This is an important issue because if the word 'marriage' in the Constitution means a union between one man and one woman, then this narrows the scope of the Federal Parliament's power. It would mean the Commonwealth can legislate only for opposite-sex marriage, thus leaving it open to the states to legislate for same-sex marriage.[262] This argument was made by Professor Williams:

> It would seem that the Federal Parliament could only cover the field of marriage – meaning opposite *and* same-sex marriage – if the Federal Parliament has power to legislate with respect to same-sex marriage in the first place. That is, it would seem unlikely that the Federal Parliament could pass legislation which indirectly prohibits the states from legislating on a certain topic, if the Federal Parliament could not directly legislate on the topic itself.[263]

6.27 The meaning of the word 'marriage' in the Constitution can be determined only by a High Court judgment. Crucially, the definition of marriage contained in the Marriage Act does not (and indeed cannot) prescribe a meaning for the purposes of the Constitution. In fact, no Australian parliament can pass a law to do that. This much has been recognised by the High Court and was articulated by Brennan J in a 1986 decision. In that case His Honour observed that the meaning of 'marriage' in the Constitution cannot be defined by Parliament and instead must be ascertained by reference to principles of constitutional interpretation:

> Constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power. The nature and incidents of the legal institution which the Constitution recognizes as "marriage" and which lie within the power conferred by s.51(xxi) are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.[264]

6.28 Stakeholders speculated about whether 'the High Court would be guided by the original intent of the framers of the Constitution or more contemporary definitions of marriage'.[265] If the Court looked to the original intent of the framers of the Constitution, it is arguable it would find that the word 'marriage' in the Constitution means a union between a man and woman. Then again, the application of more contemporary principles of constitutional interpretation would see the Constitution as a living document that adapts to societal changes. This approach might lead to the conclusion that each partner being of the opposite sex is no longer an essential component of 'marriage'. Legal specialists who gave evidence to the Committee offered various suggestions as to which outcome they thought was more likely to prevail and why.

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262 Professor Anne Twomey, Professor of Law, University of Sydney, Evidence, 6 March 2013, p 2; Submission 90, Attachment 1, pp 12-13.

263 Submission 90, Attachment 1, pp 12-13.

264 *Fisher v Fisher* (1986) 161 CLR 438, 455-6; referred to in Submission 1240, p 9; Submission 90, Attachment 1, p 4.

265 Submission 1228, Australian Marriage Equality, p 57.

6.29 Professor Lindell explained that whether a same-sex marriage would constitute 'marriage' for the purposes of the Constitution depends on whether it falls within the 'essential' meaning of 'marriage' at the time the Constitution was drafted, in line with current principles of constitutional interpretation. Referring to a number of High Court cases, he noted that this can result in outcomes that would not have been anticipated in 1900:

> Whether same-sex marriages come within the subject matter of the power will depend on whether such unions can be said to come within the essential rather than the non-essential meaning of "marriage" as at 1900 in accordance with the principles of progressive interpretation. Those principles require the powers of the Parliament to be read broadly. Sometimes the result of the application of these principles is to interpret constitutional terms to encompass developments that may not have been envisaged in 1900.[266]

6.30 There was general agreement among those who commented on it that the legal meaning of marriage has changed over time.[267] Professor Williams listed some of these changes including, for example, the availability of no-fault divorce and the abolition of marriage as a defence to rape:

> Since 1900, there have been a raft of common law and legislative developments that demonstrate that the concept of marriage has continued to evolve. For example, the Commonwealth *Marriage Act* stipulates that inability to consummate a marriage is not grounds for having a marriage nullified. The Common law defence to rape within marriage has been rejected. The Federal Court has also rejected arguments that procreation is 'one of the principal purposes of marriage', an argument often made in opposition to same-sex marriage. The *Family Law Act* now provides for no fault divorce; adultery, for example, is no longer grounds for divorce. These and other developments demonstrate that the legal meaning of marriage has changed.[268]

6.31 Professor Lindell made similar observations noting that the traditional meaning of marriage must be balanced with legal and social changes. That marriage is no longer always a union for life is an example he gave of one such change:

> … the traditional meaning has to be counterbalanced with an acknowledgement of the capacity of the [marriage] relationship to be affected by significant legal and social change which shows the meaning is not immutable. This can be demonstrated without necessarily accepting suggestions that same-sex marriages were accepted and celebrated 'in ancient Greece, Mesopotamia, Rome and even Christian states'. Perhaps the outstanding illustration is provided by the fact that marriage is no longer treated as a relationship for life.[269]

6.32 All of the experts in constitutional law, and others who gave evidence to the Committee, acknowledged that there were arguments both ways as to whether the meaning of 'marriage' as

266 Submission 103, Attachment 1, p 5.

267 See, eg, Submission 90, Attachment 1, p 7; Submission 521a, State Parliamentary Marriage Equality Working Group, p 3; Answers to supplementary questions 6 March 2013, Professor Lindell, Question 10, pp 6-7, 9; Professor Geoffrey Lindell, AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Evidence, 6 March 2013, p 36.

268 Submission 90, Attachment 1, p 7.

269 Submission 103, Attachment 2, p 2.

contained in the Constitution would include or exclude same-sex marriage.[270] Until such time as the matter is tested in the High Court even the most expert opinions remain only speculative.

Is the Marriage Act a complete statement of the law of marriage in Australia?

6.33 Several stakeholders felt that the Commonwealth Marriage Act is a complete statement of the law of marriage in Australia and that therefore a state law on any form of marriage (same-sex or otherwise) would be held by the High Court to be inoperative.[271]

6.34 One holder of this view, Professor Patrick Parkinson AM, Professor of Law at the University of Sydney, said that '[i]t is very likely that the High Court would hold that the Marriage Act 1961 covers the field of marriage'.[272] He accepted that the Marriage Act does not declare explicitly that it is the entire statement of the law on the matter but found this an unconvincing reason to conclude that the Act does not cover the field. More likely, in his view, was that a possible state law for same-sex marriage had not crossed the minds of the drafters at the time:

> It is true that the Marriage Act is not explicit about covering the field. It does not, for example, say in direct terms that a marriage solemnised after the commencement of the Act, but under a pre-1961 state law, will be ineffective. It does deal with the validity of marriages contracted overseas. However, it is a sufficient answer to this that the Marriage Act is drafted on the assumption that it is providing one uniform law for the country and for that reason it need only deal with the validity of marriages contracted overseas, not those that might (theoretically) be contracted under state laws. The issue of giving recognition to a marriage purportedly contracted under state law after the commencement of the Marriage Act 1961 had commenced simply did not arise.[273]

6.35 In legal advice to the NSW Department of Attorney General and Justice, Mr Jackson contended that the Marriage Act unquestionably covers the field of marriage in Australia and accordingly same-sex marriages would not be valid unless provided for by the Marriage Act:

> … I think it clear that the *Marriage Act* seeks to determine what shall, and what shall not, be regarded as a valid "marriage" in Australia. In that respect it "covers the field" in the relevant areas. Only those unions which satisfy the requirements of the *Marriage Act* are valid marriages in Australia. Same sex unions cannot satisfy that requirement.
>
> A law of a State which provided that a valid marriage existed in circumstances other than those provided for by the *Marriage Act* in my opinion would necessarily be inconsistent with the *Marriage Act* and, in terms of s.109, invalid.[274]

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270 Professor Twomey, Evidence, 6 March 2013, p 5; Professor Williams, Evidence, 6 March 2013, p 19; Professor Lindell, Evidence, 6 March 2013, p 38; Submission 931, pp 1-2.

271 The question is whether 'it appears from the terms, the nature of the subject matter of the Federal enactment that it was intended as a *complete* statement of the law governing a particular matter' *Victoria v Commonwealth* (1931) 58 CLR 618 at 630 per Dixon J [emphasis added]; Submission 623, p 4.

272 Submission 102, p 3.

273 Submission 102, p 4.

274 Submission 1240, pp 7-8.

6.36 Professor Lindell and others reasoned that even if same-sex marriage does not fall within the definition of 'marriage' as contained in the Constitution, the Federal Parliament could still cover the field with respect to marriage through its incidental legislative power.[275] The Commonwealth's incidental legislative power allows it to legislate on matters that do not fall squarely within the scope of the constitutional marriage power as long as they are incidental to matters that do.[276]

6.37 A question that can be asked to determine indirect inconsistency is whether the State law 'impairs, detracts from or affects' the operation of the Commonwealth law.[277] It was argued by some Inquiry participants that a New South Wales same-sex marriage law would fail this test because the purpose of the Marriage Act was to cover the field for all forms of marriage across Australia. Accordingly, any legislation to create a different kind of marriage would contradict that purpose of, and thus detract from, the Marriage Act.[278] Referring to a 1962 High Court decision, Professor Parkinson put this view as follows:

> If Taylor J was correct (and surely he was) in saying in the Marriage Act case that the main purpose of the Marriage Act was "to establish a uniform marriage law throughout the Commonwealth" then it follows that there remains no power in the States or Territories to enact a law concerning 'marriage' that allows people to marry who are not permitted to marry under the federal law.[279]

The 'cover the field' test and the effect of the 2004 amendments to the Marriage Act

6.38 Several stakeholders were confident that the 2004 amendments to the Marriage Act (outlined above at paragraphs 6.7 to 6.9) removed any doubt that the Marriage Act completely covers the field of marriage, thus ousting any possibility of states passing legislation that would be operative.[280] For example, Lawyers for the Preservation of the Definition of Marriage stated in their submission:

> [The 2004 amendments] reinforced the position that the Marriage Act covered the field of marriage (including the definitional field) and so any state same-sex marriage bills are, *prima facie,* inconsistent with the Marriage Act. The Marriage Act leaves no room for doubt that marriage, in Australian law, is a union between a man and woman.[281]

6.39 Other stakeholders argued just the opposite: that the 2004 amendments mean that the Marriage Act covers the field in respect of only opposite-sex marriages, leaving it open to the states to pass legislation for same-sex marriage.[282] Professor Williams explained:

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275 Submission 103, Attachment 1, p 6; Submission 623, p 4 and Attachment 1, p 2.

276 Submission 103, Attachment 1, p 6.

277 *Victoria v Commonwealth* (1931) 58 CLR 618, 630 (Dixon J); Submission 623, p 3; Submission 931, p 2.

278 Submission 102, p 5; Submission 623, p 3.

279 Submission 102, p 5 referring to *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529.

280 Submission 102, p 7; Submission 623, p 2; Submission 721, Mr Neil Foster, p 1.

281 Submission 623, p 2.

282 Submission 90, Attachment 1, p 14; Submission 1041, Australian Lawyers for Human Rights, p 2.

> The 2004 changes were effective in limiting the scope of the federal *Marriage Act*. However, by explicitly and carefully narrowing the scope of that Act to different sex marriage, it also may mean that the Act covers the field only with respect to those types of marriage. This outcome is perverse given the intentions of the Prime Minister, but appears to be the legal consequence of the changes he brought about. Hence, it is arguable that the federal *Marriage Act* covers the field of marriage only in so far as the concept is defined by that Act, that is between 'a man and a woman'.[283]

6.40 Professor Parkinson respectfully disagreed on this point and found it untenable that a court would find that it was the intention of Parliament when enacting the 2004 amendments to the Marriage Act that there would be a possibility of new categories of marriage:

> I respectfully disagree with [Professor Williams] that this argument is tenable with respect to the intentions of Parliament in the Marriage Amendment Act 2004. Prof. Williams' argument would require a court to find that it was the intention of Parliament in 2004 that the Marriage Act 1961 should no longer cover the field on the solemnisation of marriages in Australia and that there need no longer be a uniform marriage law for the country. Furthermore, the court would need to find that it was intended that the States should once again have the power to solemnise marriages that fall outside of the federal definition of marriage…[284]

6.41 Mr Neville Rochow, a member of Lawyers for the Preservation of the Definition of Marriage, was equally sceptical about Professor Williams' approach. While observing that the question is ultimately one for the High Court, Mr Rochow said that an argument that legislation has an effect that contradicts the apparent policy intention of the law is, in his experience, unlikely to be successful:

> If one were to make a submission to any court in which I have appeared and say that the legislation has had a perverse consequence that is contrary to the apparent policy of the Act, that would immediately put a cloud over the submission you are about to make immediately following. That is an unlikely submission, in my experience, to be accepted. One can never predict what the High Court will do and obviously this will be a matter for the High Court, but to start out by a proposition that Parliament accidentally legislated into a vacuum or created a vacuum by its legislation is a strange submission to start with.[285]

6.42 It is important to be clear about what 'intention' means for the purpose of constitutional interpretation. A Commonwealth law will 'cover the field' if *the law itself* evinces an intention to be the complete statement of the law on a particular subject matter.[286] In relation to the 2004 amendments to the Marriage Act, Professor Anne Twomey, Professor of Law at the University of Sydney, and Professor Williams explained that the Court would not look to the subjective intention of the policy-makers at the time but at the objective intention that can be gleaned from the words of the amendments.[287] However, Professor Twomey also noted that,

283 Submission 90, Attachment 1, p 14.

284 Submission 102, p 6.

285 Mr Neville Rochow, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, p 24.

286 See, eg, *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128*; Telstra v Worthing* (1997) 197 CLR 61.

287 Professor Twomey, Evidence, 6 March 2013, p 3; Professor Williams, Evidence, 6 March 2013, p 12.

even with this distinction in mind, in her view it is unlikely the Marriage Act could be read as leaving open a possibility of states legislating in the area:

> We are looking at different sorts of intention here. If you are looking at subjective intention, the subjective intention of the Howard Government in making that amendment in 2004 was not to allow the States to legislate in relation to same-sex marriage or any other sort of marriage outside the confines of that definition. I think probably everybody would accept that that was the subjective intention. When courts, however, do undertake statutory interpretation they do not necessarily look to the subjective intentions of the people but they look to the intentions as shown from the words of the amendments used, or the provisions passed by the Parliament, and interpret it in that point of view. Even then I have trouble with imagining that you could see in there an intention that it was opening up possibilities for the States to legislate in that area.[288]

6.43 Once again, the answer to this question is one that only the High Court of Australia can provide.

Direct inconsistency and the use of the word 'marriage' in a law for same-sex marriage

6.44 Several stakeholders observed that the closer a same-sex marriage law comes to 'marriage' as understood in Commonwealth legislation, the more likely it is to be directly inconsistent with the Marriage Act.[289] This point was made by Mr Jackson in his advice to the Department of Attorney General and Justice:

> There is, however, a potential problem arising when one endeavours to enact same-sex marriage laws at a State level. The problem arises because, as I understand it, the proponents of legislation of this type seek to arrive at a situation where the relationship between the parties and status of the parties, arrived at by the legislation is the same as that provided for by "marriage".
>
> The difficulty with such State legislation in that area, however, is that the more such legislation treats the union to which it applies as the same as marriage, or as having the status of marriage, or treats the parties as "married", the closer it comes to inconsistency with the Marriage Act.[290]

6.45 Professor Lindell expressed the view that the constitutional inconsistency that a state-based law for same-sex marriage raises may be less to do with whether the Commonwealth intended to cover the field and more to do with the use of the word 'marriage':

> It is not so much that the Federal Parliament has attempted to cover the field of same sex relationships—I doubt whether that is so—but the real problem is in dealing with them in a way that tries to attach the label of marriage to it.[291]

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288 Professor Twomey, Evidence, 6 March 2013, p 3.

289 See, eg, Mr Rochow, Evidence, 6 March 2013, p 23; Professor Michael Quinlan, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, p 23; Submission 1240, p 8.

290 Submission 1240, p 8.

291 Professor Lindell, Evidence, 6 March 2013, p 31.

6.46 It is arguable that the use of the word 'marriage' in a state law regulating same-sex marriage brings the state legislation into direct conflict with the Marriage Act. Professor Parkinson contended that to be confident of the constitutional validity of a state law for same-sex marriage, it would be necessary to create a kind of hybrid status, something that is sufficiently different from 'marriage' under the Commonwealth law so as not to give rise to inconsistency:

> … if a state law concerning "same sex marriage" is to have a chance of surviving constitutional challenge then it will need to create a status that is not marriage, however much it is made to *look like* marriage by copying various aspects of the Marriage Act and by using the language of "marriage". The problem is that the more it is made to look like marriage, the greater the risk of constitutional invalidity.[292]

6.47 Professor Parkinson added that the creation of a hybrid status is what the Tasmanian and South Australian bills sought to do:

> It follows that the validity of a law passed in NSW concerning same sex marriage will depend upon that law creating an institution that is sufficiently different from marriage, as understood under the Marriage Act, that there is no encroachment on the ground occupied by the uniform national law. That is indeed what the Tasmanian and South Australian Bills sought to do. Both these Bills adopted the strategy of creating a marriage-like status called a "same sex marriage" that is not actually the same as marriage in order to avoid the constitutional problems outlined above.[293]

6.48 Professor Twomey also expressed concern that a state law that purports to be legislating for 'marriage' and creating 'marriage equality' risks being in direct conflict with the Marriage Act. She also drew comparisons with the proposed Tasmanian bill which attempted to create a new category of relationship recognition for a 'same-sex marriage', making it legislatively distinct from 'marriage' in order to avoid constitutional inconsistency with the Marriage Act. In her view, if the state legislation talks about 'same-sex marriage' being part of 'marriage' as a whole, then an inconsistency could arise:

> …if you have a State piece of legislation called the Marriage Equality Bill, which is talking about marriage as opposed to what the Tasmanian legislation did—the Tasmanian legislation was much more confined. It tried to create a separate category of things called "same-sex marriage" and throughout the Act it was almost comical when you get same-sex marriage and same-sex married and I will same-sex marry you, or whatever. It was trying to stress that what it was creating was something different, it was a different institution, so it did not end up conflicting with the area the Commonwealth had legislated in relation to.
>
> … if you were trying your hardest to create legislation that was the least vulnerable to attack on grounds of inconsistency, you would be trying to move away from the idea of marriage and marriage equality, because that is just getting you into the trouble zone. You would be wanting to move further away from it, saying that this is a separate institution.[294]

[292] Submission 102, pp 7-8.

[293] Submission 102, p 8.

[294] Professor Twomey, Evidence, 6 March 2013, p 3.

6.49 Others argued that the use of the same word in federal and state legislation does not guarantee a conflict between the two and there may still be room for states to legislate on this matter.[295] Professor Williams told the Committee that the use of the same word in both federal and state laws does not automatically give rise to inconsistency, and so it is with the word 'marriage':

> … there are many examples of where the Commonwealth and the States legislate on a topic using the same word and so long as in operation those laws can operate in different areas and do not overlap, well it is quite possible they are not inconsistent, hence industrial law, anti-discrimination law—I mean, there is a long list of those types of things. Marriage has an iconic status but as a legal construct it is not materially different from a variety of other areas where it is possible to have laws on the same topic so long as they are not inconsistent in operation.[296]

6.50 The NSW Bar Association agreed that it is possible to use the same word in state and Commonwealth legislation without giving rise to inconsistency. However, it also warned that if the word 'marriage' is determined by the High Court to be critical in law, a direct inconsistency could arise:

> It may be that the resolution of the sec 109 issue will eventually focus on the nomenclature of the very word "marriage". It could well be that argument, decision and the reasons for a decision in constitutional litigation under sec 109 concerning a proposed State same sex marriage law and the Marriage Act would thoroughly contradict the indifference shown in Juliet's famous "What's in a name?". If her approach were taken, the subject maters may be parallel without inconsistency between the State and Commonwealth legislation. If names or words are critical matters, there may be direct inconsistency.[297]

6.51 The NSW Society of Labor Lawyers speculated that direct inconsistency in relation to the definition of 'marriage' could be avoided through careful legislative drafting. The Society suggested that while it would likely be inconsistent for a state same-sex marriage law to replicate the Marriage Act, the creation of rights only between same-sex couples would make a state law sufficiently distinct from the Marriage Act to avoid inconsistency with it:

> On its face, a NSW law that extended the definition of marriage to same sex couples appears inconsistent with the definition of marriage provided in the Marriage Act (Cth). However the definition provided does not positively ban same sex marriage. It creates rights between different sex couples. It is likely that it would be directly inconsistent for NSW to pass a law that replicated the current Marriage Act (Cth). However, a NSW law that creates rights only between same sex couples would not necessarily be directly inconsistent with the rights created for different sex couples under the Marriage Act (Cth).[298]

Constitutional matters related to the content of a state same-sex marriage bill

6.52 The draft bill attached to Submission 521 from the State Parliamentary Working Group on Same Sex Marriage contained some content which some stakeholders observed would give

295 Submission 1215, p 4; Submission 931, pp 2-3; Professor Williams, Evidence, 6 March 2013, p 19.

296 Professor Williams, Evidence, 6 March 2013, p 19.

297 Submission 931, pp 2-3.

298 Submission 1222, p 4.

rise to particularly obvious constitutional inconsistencies, in particular provisions to recognise same-sex marriages solemnised overseas. This issue is discussed in this section. Other constitutional issues arose in relation to a state law that would purport to provide for marriage where at least one partner is transgender or intersex and this is canvassed in Chapter 7 at paragraphs 7.26 to 7.32.

The Commonwealth ban on recognising same-sex marriages solemnised overseas

6.53 As described above, section 88EA of the Marriage Act stipulates that same-sex marriages solemnised overseas must not be recognised in Australia. Lawyers for the Preservation of the Definition of Marriage argued that any law to provide for same-sex marriage would contradict the purpose of the Marriage Act as evinced, in part, by section 88EA. They argued that a state law for same-sex marriage would effectively be permitting the very thing that section 88EA of the Marriage Act forbids:

> By introducing diversity, such Bills run contrary to the very purpose of the MA [Marriage Act]. Such Bills must seek to provide a recognition for State 'marriages' that with respect to foreign "marriages" is forbidden by section 88EA. … It seems likely that such a Bill, if passed into law would be found to be directly inconsistent with the MA.[299]

6.54 Others took a narrower view and felt that inconsistency on this point would arise only if a state-based law recognised same-sex marriages solemnised overseas.[300] In this regard, Inquiry participants expressed concern over Part VI of the draft bill contained in Submission 521 from the State Parliamentary Marriage Equality Working Group, which expressly provides for recognition of same-sex marriages solemnised overseas. It was argued that if this provision was part of a New South Wales law it would likely bring the law into direct inconsistency with the Marriage Act.[301]

The enactment of a New South Wales same-sex marriage law

6.55 The preceding sections of this Chapter have established that New South Wales has the power to enact same-sex marriage law but also that there is some disagreement as to whether that law would stand up to a constitutional challenge. This section considers the prospect and possible outcomes of a High Court challenge and what this might mean for people's rights.

The prospect of a High Court challenge and the enactment of law

6.56 Some proponents of same-sex marriage argued that while it would be preferable for the Commonwealth Government to act, in the absence of such action states should advance marriage reform.[302] Advocates of this view contended that the risk of a legal challenge in the

299 Submission 623, p 3.

300 Submission 1222, p 6; Submission 103, Attachment 1, p 7.

301 Submission 1222, p 6; Submission 1220, Victorian Gay and Lesbian Rights Lobby, p 3.

302 See, eg, Submission 90, Attachment 1, p 10; Professor Williams, Evidence, 6 March 2013, p 16; Submission 1083, Parents and Friends of Lesbians and Gays, p 18; Submission 1253, Castan Centre for Human Rights Law, p 30.

High Court should not deter the NSW Parliament from taking legislative action.[303] In its submission, the Law Society of New South Wales argued that it is the function of the High Court, not the Parliament, to resolve definitional ambiguities within the Constitution:

> It is the High Court's role, not Parliament's, to determine the definition of "marriage". States, on the other hand, are not restricted in their power to legislate on marriage, including same sex marriage. Nothing in the Constitution Act 1902 (NSW) limits this power.[304]

6.57 Indeed, Professor Williams remarked that if a potential High Court challenge was a reason not to pass a same-sex marriage law then neither federal or state parliaments could act:

> The threat of [a High Court] challenge is by no means an argument against passing such a law. If it was, there could be no argument either for a federal same-sex marriage law given the uncertainties about federal power in this area. It is also often the case that parliaments pass laws unsure of the constitutional status of the law. The job of parliaments is to enact laws as they see fit, and for those laws then to be defended in the High Court until issues around their constitutionality are resolved.[305]

6.58 Some stakeholders advised the Committee that it is common for parliaments to pass and enact law without being certain about its constitutional status, and suggested that the inconvenience or challenges associated with legislating in a complex area of law should not stop a parliament from acting.[306] Professor Williams noted that the Parliament has dealt with other issues that gave rise to very difficult constitutional law issues and will typically amend legislation to address these issues as they arise. He concluded that if legal complexity was a genuine obstacle to legislating then many things would not get done in Parliament:

> … Parliaments enact laws because they take a policy position and then they amend them, as need be and they are often tested in court, as that one will probably be shortly. The question is, if a State believes in something for its community through its Parliament, you enact and work through the issues as best you can. The complexity issue needs to be dealt with but, if that was a stumbling block, there are lots of things you would never do in this Parliament.[307]

6.59 The New South Wales Society of Labor Lawyers maintained that although there is a lack of certainty about whether a New South Wales same-sex marriage law would be operative, the very passage of the law would foster legal certainty:

> We acknowledge that there is some uncertainty regarding the effective operation of such an Act but do not regard the uncertainty as a reason to not proceed. Rather, we believe that a NSW Same Sex Marriage Act would foster legal certainty and generate momentum around same sex marriage.[308]

303 Submission 90, Attachment 1, p 15; Submission 1083, p 19; Submission 1256, p 2.

304 Submission 1256, p 2.

305 Submission 90, Attachment 1, p 15.

306 Submission 185, Mr Gordon Menzies, p 1; Submission 90, Attachment 1, p 15; Submission 1083, p 19; Submission 1228, p 60.

307 Professor Williams, Evidence, 6 March 2013, p 17.

308 Submission 1222, p 3.

6.60 Lawyers for the Preservation of the Definition of Marriage stated in their submission:

> There can be no doubt that the Marriage Act (including amendments to introduce the definition of "marriage" made by the Marriage Amendment Act 2004) is a valid enactment of the Commonwealth Parliament… It seems likely that such a Bill [same-sex marriage bill], if passed into law would be found to be directly inconsistent with the Marriage Act 1961.[309]

6.61 The issue of inconsistency is one for adjudication by the High Court.

A High Court challenge: who has standing and how might it come about?

6.62 The way to definitively determine whether a same-sex marriage law is constitutionally valid is for that law to be tested in the High Court. In order for that to happen, the law would have to be passed by the NSW Parliament, and then someone with 'standing' would seek to challenge that law in the High Court. 'Standing' means simply the legal capacity or right of a person to be heard in a court or tribunal.[310]

6.63 The Committee heard that a High Court challenge is not easy to mount. Professor Williams noted that people are too quick to assume that the law would be challenged in the High Court and that there is no guarantee that such a challenge would even arise. He added that the fact that a person has ideological objections to same-sex marriage is not enough to give them standing:[311]

> … people too readily assume this would even get to the High Court. It is not easy to raise these matters in the High Court, you need someone with the will and the money to do so. The fact that someone has an ideological, religious or other objection does not give you standing in the High Court, you need to be affected by the law in some way. … You have to identify someone perhaps who is even a party to one of these marriages that wishes to bring a challenge and they may well do so but … that could take years. [312]

6.64 Australian Marriage Equality explained that only the Commonwealth or someone who has been materially disadvantaged will have standing to challenge the law and that litigation in the High Court is expensive:

> A High Court challenge is not certain because only the Commonwealth has standing by right and other potential litigants would have to show they have been materially disadvantaged. The financial cost of a High Court loss would be several tens of thousands of dollars.[313]

6.65 Other Inquiry participants put a contrary view and advised that the High Court has adopted a quite generous approach to standing more recently and as such this particular hurdle may not

309 Submission 623, p 3.

310 *Butterworths Australian Legal Dictionary* (1997) p 1106.

311 Professor Williams, Evidence, 6 March 2013, p 16; Submission 90, Attachment 1, p 15.

312 Professor Williams, Evidence, 6 March 2013, p 16.

313 Submission 1228, pp 58-59.

be difficult to overcome.[314] Mr F. Christopher Brohier, member, Lawyers for the Preservation of the Definition of Marriage, for example, referred to three cases that imply that the High Court might take a fairly liberal approach to the issue of standing,[315] and relying on these cases concluded that Commonwealth or State Attorneys General could pursue a case:

> In our respectful submission, it is quite foreseeable that the Commonwealth or one of the State Attorneys General could take this issue up because it needs to be resolved and therefore there would be standing.[316]

6.66 Representatives of Lawyers for the Preservation of the Definition of Marriage gave some specific examples of scenarios in which a person could have standing to challenge a New South Wales same-sex marriage law. Mr Rochow gave an example of a property dispute between parties to a same-sex marriage. He suggested that one party may want to challenge the validity of the same-sex marriage law to improve their personal outcome from the dissolution of the relationship:

> Standing would immediately arise in the case of either a divorce or a property dispute under this bill if it became law because it may be that one of the parties perceives there would be some substantive or tactical advantage in attacking the validity of the law. … the first time there is a property dispute there would potentially be an issue where a party may say I am not married at all, there is no valid marriage here at all, I wish to have my property dispute determined pursuant to the Commonwealth Powers (De Facto Relationships) Act … because I think I will get a better deal out of the Family Court.[317]

6.67 However, assuming a case did come before the High Court, academics in constitutional law agreed that it is impossible to know how such a case would be decided. Professor Twomey noted that in the past it has sometimes been possible to look over the Court's previous decisions and make a solid guess as to how the Court might decide a matter. However, with two new members on the seven-member High Court bench, and two more likely to be appointed before this case would be heard, Professor Twomey said that there was no way to predict how the High Court would decide:

> Often you can read the tea-leaves in terms of where the High Court might go on things but I do not even think we have many tea-leaves in relation to this, especially seeing that we have also got new judges on the bench, We have got two new judges on the bench that we have got no real track record to look at to get indications from. You could say that some judges, for example, who would have had strong views one way or the other have left the bench.[318]

6.68 Nevertheless, assuming a High Court challenge was successfully mounted and the High Court found that the New South Wales law was inconsistent with the Marriage Act, the next question is what the consequence of that finding would be. What would it mean?

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314 Submission 90, Attachment 1, p 16; Mr F. Christopher Brohier, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, p 22.

315 Referring to the cases of *Croome v Tasmania* (1997) 191 CLR 119; *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009); *Williams v Commonwealth* [2012] HCA 23 (20 June 2012).

316 Mr Brohier, Evidence, 6 March 2013, p 22.

317 Mr Rochow, Evidence, 6 March 2013, p 22.

318 Professor Twomey, Evidence, 6 March 2013, p 5.

The impact of a High Court finding of inconsistency

6.69 There are several possible outcomes of a High Court case considering the validity of a possible state law to permit same-sex marriage. Firstly, the High Court could find that the New South Wales law is not inconsistent with Commonwealth law. This would mean that the New South Wales law could continue to operate without amendment. A second possibility is that the Court could find that the New South Wales law conflicts with Commonwealth law only in part. If that is the case then that part of the New South Wales law would be inoperative to the extent of the inconsistency but the rest of the law would stand. The third possibility is that the High Court strikes down the same-sex marriage law entirely. This section of the Report canvasses some legal concerns that were raised with the Committee about the third possibility. A prevalent concern was that if a same-sex marriage law is ruled inoperative, parties who had relied on that law in the meantime could be adversely affected.

6.70 The Australian Human Rights Commission (AHRC) outlined some of the consequences of a state law being found invalid. It said that the legal effect of a finding of invalidity would be that any acts done under the authority of that legislation would also be invalid. However, at the same time, any legal decisions made by Commonwealth authorities would remain valid.

> If the state marriage law is found to be invalid, anything done pursuant to it will also be invalid. Therefore any state marriages authorised under it will also be invalid. However, other orders such as those relating to property division, will have been made under federal legislation such as the Family Law Act on the basis of their de facto status and not their state marriage. That is, at the federal level at least, it appears that if the law is invalidated then a couple married under the Bill will be in the same position as they were before they were married. However the NSW Parliament should give consideration to whether any other orders could be made in which the court relies entirely on the basis of the existence of the marriage. These orders would be invalid.[319]

6.71 In order to avoid a situation where married couples have relied on the new law to their subsequent detriment, the Inner City Legal Centre suggested that any same-sex marriage law could include a 'savings provision' that would stipulate that the legal status of de facto relationships and the eligibility to register relationships would be preserved:

> Finally, we submit that the Inquiry should consider the inclusion of a savings provision in the Bill that would ensure, in the event that the Bill is struck down as unconstitutional, that the legal status of an otherwise existing relationship, such as a same-sex de facto relationship, is preserved, and that eligibility to register the relationship under the *Relationships Register Act 2010* (NSW) is preserved.[320]

6.72 Advocating a prudent approach, Professor Lindell suggested that it would be worthwhile to confirm the validity of any same-sex marriage law before it was relied upon by couples. He observed that although the High Court will not offer advisory opinions on the validity of a proposed law, it has in the past made declarations of validity after the relevant law has passed but before it has been enacted. Professor Lindell observed that if the NSW Parliament passed a law for same-sex marriage, seeking a declaration of validity from the High Court would provide certainty for people who rely upon it that their rights under the law are binding.

319 Submission 1255, Australian Human Rights Commission, p 7.

320 Submission 1254, pp 7-8.

However, the exercise would likely involve some degree of cooperation between the State and Federal Attorneys General. Professor Lindell explained as follows:

> Given the human consequences involved it would be desirable to have the validity of the NSW Act tested as soon as possible after it is enacted and before reliance was placed on the provisions of the NSW Act.
>
> While it is theoretically true that the High Court does not give advisory opinions this difficulty may be largely avoided by a combination of the High Court's –
>
> (1) previous willingness to grant declaratory relief before legislation is proclaimed into operation; and
>
> (2) upholding the standing of an Attorney-General to seek a declaration of validity instead of invalidity in relation to legislation enacted by the Parliament of which he or she is a member,
>
> It is worth remembering that the provisions with respect to the legitimation of children born of subsequent and void marriages under Commonwealth legislation was judicially tested before the legislation was proclaimed into operation by the Attorney – General (Vic) seeking a declaration of invalidity against the Commonwealth. I understand the proceedings were essentially in the nature of test proceedings commenced with the agreement of both parties.
>
> The position here could be essentially the same except in reverse with this time the Attorney- General of the Commonwealth seeking a declaration of invalidity against the State of NSW.[321]

6.73 Professor Williams similarly suggested that, in order to avoid people relying on the law only to have it determined invalid later, it may be worthwhile to construct a test case in the High Court:

> [The enactment of a State law] obviously creates momentum in terms of people being married. If you look at California and elsewhere, once people are married, attitudes change even more quickly. However, there is also a risk that if people are married, over a long period of time there is a risk that could be undone down the track through the inconsistency problem. That is obviously highly undesirable. If a law of this kind was enacted, it might be desirable to manufacture a test case in the High Court, so that you can get quick resolution of these issues so that, rather than people being married over a long period of time, you get an answer sooner, rather than later.[322]

Committee comment

6.74 Many submission makers asserted a strongly held view that only the Federal Parliament has the power to legislate in respect of marriage. The Committee has found this to be an error of fact. There is no doubt that Australian states have the power to legislate on the subject of marriage. For the purpose of informed public debate on this subject, the Committee considers it important to clarify this point.

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321 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 8, pp 5-6.

322 Professor Williams, Evidence, 6 March 2013, p 16.

6.75 The critical question in terms of a possible same-sex marriage law in this State is thus not whether New South Wales can legislate on the subject of marriage but whether it chooses to do so and what the legal implications of that choice might be. We do not know whether such legislation would give rise to an inconsistency with the Marriage Act 1961 and as such, the Committee is unable to draw a conclusion on this point. The High Court could find the law to be inoperative in whole or in part, or it could find the law to be operative in its entirety. The question of constitutional inconsistency is complex. The Committee received assistance from experts in constitutional law, all of whom acknowledged that while they could voice an opinion on possible constitutional inconsistencies, the matter can be resolved by only the High Court.

6.76 There is nothing to prevent the NSW Parliament passing legislation that might, or might not, be inconsistent with Commonwealth law. There is precedent for this and indeed, it is not possible to guarantee the constitutional validity of any state law prior to its enactment. The High Court can confirm the validity of a law only after it has been passed by the Parliament. This would occur when that legislation is challenged by someone with standing to do so or a declaration of validity is sought.

6.77 In relation to the constitutional validity of a New South Wales same-sex marriage law, the Committee holds considerable concern for the rights of couples who might rely on a law that is later determined to be inoperative. It is foreseeable that if a law to provide for same-sex marriage in New South Wales was enacted, couples might marry under that law prior to a High Court challenge. If the legislation was later determined to be inoperative those couples could be left with uncertain legal rights. With this in mind, the Committee considers that if a law to provide for same-sex marriage in New South Wales is passed, the NSW Government should ensure that the legal rights of couples who rely on that law are protected in the event that the law or part thereof, fails to survive constitutional challenge.

Finding

The Committee finds that:

1. The State of New South Wales has the constitutional power to legislate on the subject of marriage;
2. Should New South Wales choose to exercise this power and enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia;
3. If such a challenge occurs it is uncertain what the outcome of the case would be; and
4. Equal marriage rights for all Australians may best be achieved under Commonwealth legislation.

Chapter 7 The operation and content of a New South Wales same-sex marriage law

In Chapter 6 the Committee considered some of the legal technicalities of whether the New South Wales Parliament could enact a same-sex marriage law. It concluded that New South Wales can legislate on the subject of marriage but that it was unclear whether the law would be operative. In the event of a same-sex marriage law being passed by the New South Wales Parliament, this Chapter addresses how such a law might work, including its interoperability with law in other jurisdictions.

Submission 521 from the State Parliamentary Marriage Equality Working Group contained a draft 'State Marriage Equality Bill 2013' (hereafter 'the Draft Bill') which provided a platform for some comment from Inquiry participants on the content of a same-sex marriage law. The last two sections of this Chapter address themes prominent within submissions on that bill: firstly, how the law would deal with the breakdown of a same-sex marriage; and secondly, whether it is legally necessary for one of the parties to the same-sex marriage to be ordinarily living in New South Wales.

Would a same-sex marriage be recognised in other Australian States and Territories?

7.1 This section considers the interoperability of a New South Wales same-sex marriage law with laws in other Australian jurisdictions. A critical factor is how courts decide which laws to apply. In short, this will depend on the content of the law, the circumstances of the case and the law of jurisdiction in which the deciding court operates.

Choice of law and rules of private international law

7.2 Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, informed the Committee that whether the rights and responsibilities that accrue under a New South Wales same-sex marriage law would be recognised in other Australian jurisdictions depends on 'the application of common law rules of private international law with regard to the recognition of marriages…'[323]

7.3 Private international law is 'the body of rules … that indicate how a foreign element in a legal problem should be dealt with'.[324] Professor Lindell explained that it is as though each jurisdiction in Australia is treated as if it is a separate country for this purpose and that is why private 'international' law applies. Principles of private international law help legal decision-makers to work out which law will govern a given legal situation where the law of more than one Australian jurisdiction could be applied.

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323 Submission 103, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Attachment 1, p 7; Answers to supplementary questions 6 March 2013, Professor Anne Twomey, Professor of Law, University of Sydney, Question 2, p 2. The phrase 'common law rules' means law that is created and elaborated upon by courts as distinct from laws that are passed by Parliament in the form of legislation.

324 Mortensen R, Garnett R & Keyes, *Private International Law in Australia* (2nd ed, 2011) p 3.

7.4 Professor Lindell further advised the Committee that in Australia, where the law of more than one jurisdiction could govern a situation, a process of 'jurisdiction selecting' is employed to work out which law applies. Using this method, if a Victorian court was asked to, for example, determine the validity of a same-sex marriage solemnised under New South Wales law, it would consider the connecting factors to determine the law governing the relationship. In Professor Lindell's view, an important connecting factor would be where the marriage was solemnised:[325]

> The Anglo-Australian rules of private international law adopt what is regarded as a *jurisdiction selecting* technique for determining which laws will be applied to govern the rights and duties of parties to litigation where the litigation contains a foreign element; that is, involves facts which occurred outside the court of the forum… Many aspects of the formal validity of a marriage would be determined by the law of the place where it was solemnised.[326]

7.5 However, whether the solemnisation would carry any real weight would in part depend on whether the relationship was recognised as a 'marriage'.[327] If same-sex unions solemnised as 'marriages' in New South Wales were not recognised as 'marriages' in other jurisdictions, then even more complex legal issues arise about how the law applicable to that relationship would be determined.

7.6 In an article written about the Tasmanian proposed same-sex marriage bill, Professor Lindell elaborated that if other jurisdictions do not recognise a New South Wales 'same-sex marriage' as 'marriage' then these relationships might create a new category of law. If a new category was created then a question would arise as to whether this would also create a new 'connecting factor' for the purposes of jurisdiction selection:

> If same-sex unions are not characterised as marriages for these purposes, the question arises whether the creation of such legal relationships as an additional form of family unions:
>
> - Entails the creation of an entirely new category of law; and one
> - That is capable of generating a new connecting factor to determine which law will apply to govern the recognition of the new legal relationship rather than seek to absorb for that purpose the new relationship into some pre-existing category of law.[328]

7.7 Professor Lindell warned that if a specific type of marriage, such as same-sex marriage, is not recognised under the law of the forum that is hearing the matter, then it is possible that jurisdiction might not recognise that union as marriage at all.[329] Professor Lindell later elaborated that based on his understanding of private international law, the creation of marriages that are recognised in some jurisdictions but not others would not be desirable:

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325 Submission 103, Attachment 1, p 8.

326 Submission 103, Attachment 1, p 8.

327 Submission 103, Attachment 1, p 8. In Chapter 6 the Committee outlines that the constitutional meaning of 'marriage' is not clear and this could have implications for the validity of a New South Wales same-sex marriage law.

328 Submission 103, Attachment 1, p 8.

329 Submission 103, Attachment 1, p 9.

> … my teaching on private international law drawn from the experience of traditional marriages celebrated overseas, leads me to think that the last thing we want to encourage is the notion of limping marriages which are recognised in some jurisdictions and not others. Parties to such relationships should be certain about their status wherever they reside in Australia or for that matter the rest of the world.[330]

7.8 Notwithstanding the challenges involved in the application of principles of private international law, the Committee was informed that there are possible alternative paths to interstate recognition of same-sex marriage. For example, the Committee was informed that the Constitutional requirement to give full faith and credit to laws of other States can put the common law rules of private international to one side.[331] This is considered in the next section.

The obligation to give full faith and credit to laws of other States

7.9 Section 118 of the Australian Constitution requires Australian jurisdictions to accord 'full faith and credit' to the laws of other Australian jurisdictions. Some legal commentators acknowledged that this provision could provide authority for the view that a New South Wales same-sex marriage law would be recognised in other jurisdictions.[332] Section 118 reads as follows:

> Full faith and credit shall be given, through the Commonwealth to the laws, and the public Acts and records, and the judicial proceedings of every State.

7.10 The New South Wales Society of Labor Lawyers advised the Committee that on the basis of section 118 it would be unlikely that another State could refuse to recognise a same-sex marriage solemnised in New South Wales:

> If another State within Australia passed a law purporting not to recognise a NSW same-sex solemnisation it is unlikely that it would be given effect due to the 'full faith and credit' provisions found in section 118 of the Commonwealth Constitution.[333]

7.11 Stakeholders were confident that Australian jurisdictions cannot decline to recognise the law of another solely for public policy reasons.[334] Other than this, however, the Committee was advised that the scope of the obligation to give 'full faith and credit' to the law of other

330 Answers to supplementary questions 6 March 2013, Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Question 7, p 5.

331 Submission 103, Attachment 1, p 9.

332 Submission 1222, NSW Society of Labor Lawyers, p 6; Submission 1255, Australian Human Rights Commission, p 6; Submission 1256, Law Society of NSW, p 3; see also Submission 1257, Mr Christopher Puplick AM and Mr Larry Galbraith, p 45.

333 Submission 1222, p 6.

334 Submission 1255, p 6 referring to obiter dicta of the High Court in *Pfieffer v Rogerson* (2000) 203 CLR 503, 533 [63]–[5]; Answers to supplementary questions 6 March 2013, Professor Lindell, Question 2, p 2; Submission 103, Attachment 1, p 9; Submission 1240, Department of Attorney General and Justice, p 11; Submission 1255, p 6.

jurisdictions is uncertain.[335] In his advice to the Department of Attorney General and Justice, Mr David Jackson AM QC noted that there remain questions about the scope of section 118 and what, specifically, would be recognised and for what purpose:

> It is clear that these provisions [section 118 of the Constitution and section 185 of the Evidence Act 1995 (Cth)] would allow the recognition of the Sate same-sex marriage law in other jurisdictions in Australia. But, as so often occurs in relation to recognition issues, there are questions as to recognition as what, and for what purpose.[336]

7.12 As iterated throughout this Report, where the Constitution is ambiguous, opinions about how that ambiguity might be resolved are entirely hypothetical until the High Court decides a relevant case. Therefore it is not clear whether the full faith and credit provision of the Constitution would ensure the recognition of a New South Wales same-sex marriage law until it is tested in the High Court.

Cross-vesting legislation as a mechanism for interstate recognition

7.13 Some academics canvassed the possibility that cross-vesting legislation could provide interstate recognition of a state-based same-sex marriage law.[337] 'Cross-vesting legislation' refers to identical legislation passed by the Commonwealth and all the States and Territories of Australia in 1987. Among other things, that legislation conferred jurisdiction in State matters on the courts of other States and Territories and essentially allowed for matters to be transferred between Supreme Courts.[338]

7.14 The idea that cross-vesting legislation might be relied upon for interstate recognition was alluded to in the submission from Professor Parkinson AM, Professor of Law, University of Sydney. In commenting on a possible South Australian same-sex marriage law, he noted the potential legal challenges to the dissolution of a state-based same-sex marriage. He accepted that in some circumstances cross-vesting legislation might overcome these legal hurdles, but that this was not guaranteed and would depend upon the scope of the legislation:

> If the couple were to leave South Australia, their relationship would not be recognised as a marriage under the law of other states and territories, and they could not dissolve their "same sex marriage" by application to the court of another State or Territory. The only exception would be if the dissolution of the "same sex marriage" could be brought within the scope of the national cross-vesting legislation, because it is ancillary to some other dispute for which the court has jurisdiction.[339]

335 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 2, p 2; Submission 103, Attachment 1, p 9; Submission 1240, p 11; Submission 1255, p 6.

336 Submission 1240, p 11.

337 Submission 103, Attachment 1, p 10; Submission 102, Professor Patrick Parkinson, Professor of Law, University of Sydney, p 12.

338 See *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).

339 Submission 102, p 12.

7.15 Professor Lindell explained that although cross-vesting legislation provides a novel possibility for interstate recognition of a New South Wales same-sex marriage law, considerable legal obstacles would remain. These include whether State Parliaments have the power to vest the jurisdiction of their own courts in the courts of other States:

> I assume under the proposed legislation the NSW Supreme Court would have jurisdiction to grant declarations recognising the efficacy of same-sex marriages in relation to eligible parties.
>
> Under the cooperative and complementary State legislative regime known as the National cross-vesting scheme the NSW Parliament has conferred on the Supreme Courts of each of the other States the jurisdiction conferred on the NSW Supreme Court.
>
> The Parliaments of those other States have authorised their own Supreme Courts to exercise the cross-vested jurisdiction.
>
> This assumes that the jurisdiction to grant declarations recognising same sex marriages is itself constitutionally valid and not inconsistent with valid federal legislation
>
> It also assumes that Australian State Parliaments have the power to vest the jurisdictions of their own courts in the courts of other States – a matter that is not entirely free from some doubt.

7.16 Professor Lindell concluded that the most effective way to ensure cross-jurisdictional recognition of a New South Wales same-sex marriage law would be to convince those other parliaments to pass corresponding legislation:

> But undoubtedly the most direct and effective way to secure recognition in other States and Territories is to persuade the Parliaments of those jurisdictions to pass legislation which would recognise such unions in their jurisdictions.[340]

7.17 To a large extent, whether a New South Wales same-sex marriage law would or could be recognised elsewhere hinges upon the content of that law. The following sections deal more closely with the possible content and legal effect of same-sex marriage law.

Where and to whom would a same-sex marriage law apply?

7.18 Over the course of the Committee's Inquiry, some participants queried the scope of a possible law for same-sex marriage in New South Wales. Two legal questions arose in particular. The first was whether people who live outside New South Wales would be able to travel to this State to have a same-sex marriage solemnised or whether residency in this State would be necessary as a matter of law. The second was whether people who are transgender or intersex would be eligible to wed in a same-sex marriage.

[340] Answers to supplementary questions 6 March 2013, Professor Lindell, Question 2, p 2.

Residency in New South Wales

7.19 Several Inquiry participants expressed concern over a same-sex marriage law that would provide for same-sex marriage only where at least one person is ordinarily resident in New South Wales.[341] Some Inquiry participants felt that this discriminated against people in other States who might want to get married here.[342] For example, the Victorian Gay and Lesbian Rights Lobby wrote:

> The VGLRL opposes any residency requirement and submits that all Australians should have access to marriage regardless of their sexual orientation and where they live. Legislating for marriage equality in NSW would enable Victorian couples to travel to NSW to marry. This would be welcomed by the many LGBTI couples living in Victoria who wish to marry.[343]

7.20 In terms of whether the provision is discriminatory as a matter of constitutional law, Professor Lindell alerted the Committee to a potential issue on this point.[344] Section 117 of the Australian Constitution creates a prohibition on the exercise of State legislative power which discriminates against residents of other States. It provides:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

7.21 Thus, Professor Lindell advised, if same-sex marriage is available to only New South Wales residents, it could be in violation of section 117 because its effect would be to discriminate against people who were not resident in New South Wales:

> The moment you … limit the facility of same-sex unions or same-sex marriages … to people who are resident in the State then section 117 comes into play because you are not allowed to discriminate on grounds of residents in the State.[345]

341 See, eg, Submission 1083, Parents and Friends of Lesbians and Gays, p 20; Submission 1160, Tasmanian Gay and Lesbian Rights Lobby, pp 2-3, 10-11; Submission 1220, Victorian Gay and Lesbian Rights Lobby, p 2; Submission 1130, Councilor Linda Scott, City of Sydney, p 1. Clause 5(c) of the consultation draft of a bill for a same-sex marriage contained within Submission 521 provided *inter alia* that in order to be eligible to be married, at least one of the parties 'must ordinarily reside in New South Wales'.

342 Submission 1083, p 20; Submission 1160, pp 2-3, 10-11.

343 Submission 1220, p 2.

344 Submission 103, Attachment 1, p 3.

345 Professor Geoffrey Lindell AM, Professorial Fellow University of Melbourne Law School and Adjunct Professor of Law University of Adelaide, Evidence, 6 March 2013, pp 34-35.

7.22 However, the Committee was also informed that New South Wales might be prevented from allowing same-sex couples from outside the State to marry here because its constitutional power to legislate is territorially limited. On this basis, Professor Lindell advised the Committee that a proposed law might need to be restricted to only residents of New South Wales. However, he also cautioned that the legal position is not entirely clear:

> My view is that residency may be necessary.
>
> … the reason for this is that the power of State Parliaments to legislate is subject to some weak territorial limitations which may confine their legislation to deal with persons who are resident or domiciled in their States.
>
> However on further reflection it may well be that the power would extend to marriages celebrated in New South Wales regardless of whether either or both parties to such marriages are resident or domiciled in the State.
>
> If it does the failure to cover such marriages may increase the chances of breaching the prohibition on discrimination in s 117.[346]

7.23 Conversely, Professor George Williams AO, Professor of Law, University of New South Wales, said that it was important for any law to take into account the mobility of the Australian population and that residency in New South Wales is probably not a justifiable prerequisite for marrying here:

> Any legislation of this kind, however well or carefully designed for the interests of the people of this State, needs to take account of the mobility of the Australian population. It is difficult these days to qualify anything by State residency, unless it is about tax or a narrow set of interests.[347]

7.24 Analogous concerns arose regarding the dissolution of a same-sex marriage. For example, clause 20 of the Draft Bill provides that legal action to dissolve a same-sex marriage may be commenced if any party to the proceedings is, among other things, ordinarily resident in New South Wales. This creates a potential legal difficulty if the parties to the same-sex marriage have left New South Wales but want to end the relationship. Professor Anne Twomey, Professor of Law at the University of Sydney, asked '[w]hat if the parties are non-citizens or no longer resident in New South Wales? How can the same-sex marriage be dissolved, or must it persist in perpetuity?'[348]

7.25 The Tasmanian Gay and Lesbian Rights Lobby contended that residence in New South Wales was an unnecessary precondition to grant a divorce. The submission further argued that it is common for inter-jurisdictional divorce to involve more legal complexity but that this does not justify confining its availability to only residents of New South Wales:

> Some say residency is important to limit the need for couples to travel interstate to divorce. Our response is that inter-jurisdictional divorce often requires extra hurdles

346 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 6, p 5.

347 Professor George Williams AO, Professor of Law, University of New South Wales, Evidence, 6 March 2013, p 18.

348 Submission 622, Professor Anne Twomey, Professor of Law, University of Sydney, p 4.

> to be jumped. Same-sex couples who marry interstate will be aware of these issues in the same way as same-sex couples who now marry overseas.[349]

Transgender and intersex people

7.26 Issues related to the rights of transgender and intersex people to marry also arose during this Inquiry.[350] A transgender person is someone who has biological characteristics that are at odds with the gender with which they identify. An intersex person is someone who may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to determine their sex.[351] The Australian Guidelines for Gender Recognition provide the following definitions of transgender and intersex:

> Transgender / trans
>
> A person who is trans or transgender is someone who identifies as a gender that is different to the sex assigned to them at birth. People who are transgender are born exclusively male or female, but emotionally or psychologically identify as a different sex. This includes people who identify as a sex other than their birth sex regardless of whether they have undergone hormone therapy, sex reassignment surgery or other physical procedures.[352]
>
> Intersex
>
> An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences. [353]

7.27 Intersex people can marry pursuant to the Marriage Act provided that their sex can be conclusively determined to ensure that the marriage is between a man and a woman.[354] This means that if a person's biological sex cannot be determined, they will not be able to marry under the Marriage Act.

7.28 The Draft Bill in Submission 521 contained a note that 'the reference to people who are of the same sex is not intended to exclude persons who, although legally recognised as being of the same sex, are in fact of indeterminate sex.' Other aspects of the bill purported to provide for the marriage of two people 'regardless' of their sex.

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349 Submission 1160, p 10.

350 Submission 1050, Doctors for Marriage Equality, p 1; Submission 1254, Inner City Legal Centre, pp 9-10; Submission 1255, p 8; Submission 1214, Organisation Intersex International Australia Limited, p 1.

351 Submission 1214, p 1.

352 Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, July 2013, p 10.

353 Ibid.

354 Submission 1254, p 9; Submission 1255, p 8.

7.29 The Inner City Legal Centre observed that there are obstacles for transgender people to get married if their biological sex differs from their identified gender. The Centre elucidated that for the purposes of marriage 'their gender will be regarded as their biological sex, even though this is usually at sharp odds with their identified gender'.[355] Accordingly, the Inner City Legal Centre encouraged the use of gender neutral language in law about marriage, notwithstanding likely constitutional legal challenges.[356]

7.30 A state-based same-sex marriage law that is inclusive of transgender and transsexual persons gives rise to substantial challenges in constitutional law. This is because the law would purport to provide for marriage of opposite-sex couples and thus would directly conflict with the Marriage Act. A direct inconsistency such as this would render the State legislation inoperative, at least to the extent of that inconsistency (see Chapter 6 for further discussion of constitutional inconsistency). In her submission to the Committee, Professor Twomey observed that the Draft Bill risks constitutional challenge on this basis, and described the issue as follows:

> My first point of concern is the long title of the Bill. It is described as 'A Bill for an Act to provide for marriage equality by allowing for same-sex marriage between two adults regardless of their sex.' While I understand that the purpose is to incorporate persons of indeterminate sex, the difficulty is that it may give rise to an inconsistency with the Commonwealth's *Marriage Act* as it would appear to contemplate the marriage of a man and a woman (because it includes two adults regardless of their sex).[357]

7.31 The Committee notes that a later iteration of the Draft Bill has removed the reference to 'two adults regardless of their sex' from its long title.[358]

7.32 In June of this year the Commonwealth Parliament passed legislation to create new categories of discrimination in Australian law. The Act forbids discrimination against people on the basis of their sexuality, gender identity and intersex status. However, it provides an exemption for anything done in direct compliance with the Marriage Act.[359]

How would the law deal with the breakdown of a same-sex marriage?

7.33 The terms of reference asked the Committee to consider the rights of parties married under a same-sex marriage law upon the dissolution of the relationship. When any relationship breaks down there are questions about how any property should be divided, financial obligations and custody of children. It is not clear how the dissolution of a same-sex marriage would fit within the existing legal regime. Accordingly, this section considers how the law governing the dissolution of legally recognised relationships could operate to deal with the breakdown of a same-sex marriage.

355 Submission 1254, p 10.

356 Submission 1254, p 10.

357 Submission 622, p 3.

358 Submission 521b, State Parliamentary Marriage Equality Working Group, p 2.

359 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* s 52; Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [74], 21.

7.34 Chapters 3 of this Report described the framework for marriage regulation in New South Wales. As outlined there, the NSW Parliament has referred to the Commonwealth the power to regulate financial and property matters as well as matters relating to the maintenance and custody of children arising from the dissolution of personal relationships.[360] This means that couples whose relationships are recognised by New South Wales law are subject to Commonwealth law for legal matters arising from the relationship's end.[361] The way the Family Court deals with matters arising from the breakdown of these relationships is the same regardless of whether the relationship is between partners who are married or de facto.[362]

7.35 Some Inquiry participants were of the view that the dissolution of a same-sex marriage might not be governed by the Commonwealth.[363] The following section canvasses stakeholder opinions on whether it would.

Would the breakdown of a same-sex marriage be governed by Commonwealth law?

7.36 Stakeholders generally agreed that a same-sex marriage is unlikely to be considered 'marriage' for the purposes of Commonwealth law.[364] Accordingly, the Commonwealth law dealing with a marriage breakdown might not automatically apply to a same-sex marriage. Various stakeholders contended that it is more likely that the Commonwealth provisions regarding de facto couples would be applied to a same-sex marriage.[365] However, that too is unclear and could involve additional legal hurdles.

7.37 Through the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) (hereafter 'the Referring Act'), New South Wales has transferred its power to govern the dissolution of de facto relationships to the Commonwealth. Other States and Territories have done the same. For the purpose of this referral, a de facto relationship is defined as 'a marriage-like relationship (*other than a legal marriage*) between two persons'.[366] According to Professor Parkinson and others, the meaning of 'marriage' in the phrase 'other than a legal marriage' will be crucial to determining how rights would be governed in the dissolution of same-sex marriage.[367]

7.38 Determining which law applies is important because if the dissolution of a same-sex marriage was governed by Commonwealth law, then if a married same-sex couple ended their relationship, their legal rights would be substantially the same as married and de facto couples. However, if they are not governed by Commonwealth law, then arguably the legal rights of couples married under a New South Wales same-sex marriage law will be weaker. For instance, Mr Christopher Puplick AM and Mr Larry Galbraith argued that if the breakdown of

360 This includes registered relationships. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (Family Law – Children) Act 1986* (NSW); see also Submission 622, p 2.

361 If the relationship ended after 1 March 2009.

362 Submission 1257, p 47.

363 Submission 102, p 12; Submission 1240, p 12.

364 Submission 622, p 2; Professor Patrick Parkinson, Professor of Law, University of Sydney, Evidence, 6 March 2013, p 40; Submission 1254, p 5; Submission 1255, p 6.

365 See, eg, Submission 622, p 4; Submission 1254, pp 8-9.

366 *Commonwealth Powers (De Facto Relationships) Act 2003* section 3[emphasis added].

367 Submission 1254, pp 8-9; Submission 1255, pp 6-7; Submission 102, p 15.

a same-sex marriage was to be governed by current New South Wales legislation, as proposed in the Draft Bill, the effect would be to entrench disparate treatment. Their submission maintained that the Draft Bill would leave couples who have been married under that law with inferior legal rights compared with couples whose relationships are governed by Commonwealth law. They further explained that couples enjoy a narrower set of rights when their relationships are governed by State law:

> Firstly, a party to a domestic relationship is not liable to maintain the other party to the relationship, and neither party is entitled to claim maintenance from the other, except in the limited circumstances provided for in the Act. The matters the Court can consider are much more limited than the extensive needs factors set out in s75(2) of the Family Law Act (for married couples) and sSF (2) of the Family Law Act (for de facto couples).
>
> Similarly, the matters the Court can take into account when making orders about property under s20 of the Property (Relationships) Act are much more limited than under the s79 (4) of (for married couples) and s94SM (4) of the Family Law Act (for de facto couples).[368]

7.39 Whether State or Commonwealth law governs the dissolution of a relationship is especially important in relation to rights to superannuation, which cannot be divided under State law. Professor Parkinson explained:

> But in 2003 [New South Wales] surrendered the power to make laws in this area to the Commonwealth. There was a very simple and good reason why we did that; first of all to try to resolve the complications and problems of having to litigate in different courts, but critically because of superannuation. Superannuation is one of the most valuable assets that people have and when couples split up it can be very, very important to divide superannuation fairly between them, particularly for a woman who has been a primary carer of children, who has been out of the workforce, has not built up superannuation in the course of their working lives to the same extent.
>
> Any family lawyer will tell you that the division of superannuation is of really great importance to some couples. It cannot be done under State law. It cannot be done because it has relied upon constitutional developments and enactments at Federal law, which has basically turned superannuation funds into corporations and brought them in under some very complicated laws and regulations.[369]

7.40 The Committee was informed that amendments could be made to Commonwealth and State law to ensure Commonwealth law applies to the dissolution of same-sex marriages. Possible amendments and their implications are discussed from paragraph 7.49.

The meaning of 'other than a legal marriage'

7.41 As noted, a de facto relationship is defined as 'a marriage-like relationship (*other than a legal marriage*) between two persons'. Some stakeholders explained to the Committee that it is not clear what the words 'legal marriage' in the phrase 'other than a legal marriage' will be interpreted to mean. If the phrase means 'marriage' as defined by the Commonwealth Marriage Act (that is, between a man and a woman), then a *same-sex* marriage would be

368 Submission 1257, p 48.

369 Professor Parkinson, Evidence, 6 March 2013, p 41.

something 'other than a legal marriage'. This in turn would mean that a same-sex marriage could be subject to the State's referral of power to the Commonwealth and would be governed by Commonwealth law for the purposes of its dissolution, the same as for de facto couples.[370]

7.42 However, if the word 'marriage' in the words 'other than a legal marriage' means something broader, something that would include a same-sex marriage, then the dissolution of a same-sex marriage probably would not be covered by Commonwealth law. This is because even though it is considered a 'legal marriage' for the purposes of the NSW Referring Act, it would not be considered 'marriage' for the purposes of the Commonwealth Marriage Act because that Act defines marriage as being between a man and a woman.

7.43 The Inner City Legal Centre elaborated on what this means for how the law would deal with the dissolution of same-sex marriage. First the Centre outlined what happen if the words 'legal marriage' in the phrase 'other than a legal marriage' were given a meaning that corresponds with the Marriage Act.

> … will the words 'legal marriage' in section 3 be given a meaning that accords with:
>
> 1. The Marriage Act 1961, in which case:
> - The reference of powers to the Federal Parliament may thereby be preserved in its current form. The *Family Law Act 1975* will apply to same-sex marriages that satisfy the de facto relationship definition under that Act and these couples will be able to engage the benefits of Federal law, such as superannuation splitting.
> - Although the NSW Parliament may still retain concurrent power with the Federal Parliament to legislate with respect to de facto relationships, NSW legislation inconsistent with the *Family Law Act 1975* may be rendered void under section 109 of the Constitution.
> - The referring Act may need to be amended to provide more clarity and ensure the Family Court does not interpret the reference of powers otherwise.[371]

7.44 Secondly, the Centre described the legal outcome if the words 'legal marriage' in the phrase 'other than a legal marriage' meant something broader than a marriage under the Marriage Act. In this case, it explained, a more complex set of legal arrangements would govern the relationship's dissolution:

> 2. The changes to 'marriage' since brought about by the proposed Bill, in which case:
> - NSW law that has carved out provisions to deal with same-sex marriages will be engaged. The shortfalls recognised by the principal object of the reference of powers will re-emerge. The limits of the *Property (Relationships) Act 1984* (NSW), such as the inability of the Court to consider the future needs of the parties, will also re-emerge.[372]

7.45 Professor Twomey informed the Committee that similar legal difficulties concerning what law applied to the dissolution of a same-sex marriage would arise regardless of whether a new law called that union a 'same-sex marriage' or a 'same-sex civil union':

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370 This includes registered relationships which are considered 'de facto' for the purposes of Commonwealth law.

371 Submission 1254, pp 8-9.

372 Submission 1254, pp 8-9.

> Important issues would remain as to whether same-sex couples in civil unions were regarded as being in de facto relationships under Commonwealth laws too and how the Commonwealth and States laws would interact. These issues would still need to be resolved.[373]

The creation of a new category of legal relationship

7.46 According to some Inquiry participants it follows that in order for a state-based same-sex marriage law to function effectively and to confer rights on the parties with certainty it might be necessary to create a new and distinct legal category to cater for these relationships. In Chapter 6 (paragraphs 6.44 to 6.51) the Committee described stakeholder views that any New South Wales same-sex marriage law would need to be distinct from 'marriage' as defined in the Marriage Act to avoid constitutional inconsistency.

7.47 Some stakeholders saw a need for a new category of legal relationship not only to avoid constitutional inconsistency but also to ensure recognition of legal rights across jurisdictions. For instance, Professor Parkinson maintained that a new 'hybrid' relationship status would be necessary both for the purposes of inter-jurisdictional recognition and constitutional validity. He described this as a kind of hybrid relationship status the consequence of which would be that it is treated as a 'de facto' relationship for the purpose of Commonwealth law:

> … what you could do is create a new kind of status which is known nowhere else in the world, it does not exist, called a same-sex marriage as opposed to a marriage between a couple of the same sex, which is a hybrid status. It is treated as a marriage for most but not all purposes under State law. It would not be treated, could not be treated as a marriage for Federal law purposes; it would have to be treated as a de facto relationship for Federal law purposes and then in other States, unless they passed some sort of legislation, it would also be recognised as a de facto relationship only.[374]

7.48 However, a principal concern among other stakeholders was that the creation of a new legal status for same-sex marriage could create inconsistencies that might exacerbate rather than address the differences in the way the law treats same-sex and opposite-sex couples.

Possible consequential amendments to State and Commonwealth legislation

7.49 Professor Lindell concurred with the sentiment that it is preferable to avoid law that would lead to unequal outcomes. He expressed the view that a better approach is one that provides uniformity of treatment for partners of the same-sex and the opposite-sex:

> I believe that so far as possible there should be uniformity of treatment when it comes to dissolution of same sex marriages with dissolutions of traditional marriages.[375]

7.50 A possible method to achieve greater uniformity of treatment that was put forward by several stakeholders was amendment to Commonwealth and State legislation.[376] The first was to

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373 Answers to supplementary questions 6 March 2013, Professor Anne Twomey, Professor of Law, University of Sydney, Question 1, p 2.

374 Professor Parkinson, Evidence, 6 March 2013, p 40.

375 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 7, p 5.

amend Commonwealth law to ensure parties to a same-sex marriage enjoy substantially the same entitlements as parties to an opposite-sex marriage. Professor Lindell described this as follows:[377]

> … while same sex marriages are not marriages under the Marriage Act or any other Commonwealth legislation which is conditioned on the existence of a marriage this does not prevent the Commonwealth Parliament from altering - as I think it has - other federal legislation to ensure that
>
> - so far as possible such a marriage will enjoy the same rights as the parties to a traditional marriage falling short of those rights which flow from the Marriage Act itself and
> - without treating such relationships as marriages.[378]

7.51 Another possible and complementary modification suggested was to amend the (NSW) Referring Act to ensure that in its referral, a de facto relationship includes a same-sex marriage. The Australian Human Rights Commission explained this approach:[379]

> To ensure that same-sex couples can continue to be recognised under federal law, for example for the purposes of accessing the property division regime of the Family Court, the NSW Parliament should clarify that in its referral of powers a de facto relationship includes a marriage under the Bill.[380]

7.52 These amendments would avoid couples having to prove the requirements of de facto status and reflect the way that registered relationships are treated in law. As outlined in Chapter 3, registration of a relationship gives couples immediate access to de facto status for the purposes of Commonwealth law without couples having to prove matters such as having lived together for two years.

7.53 However, if these legislative amendments were not enacted then a law providing for same-sex marriage in New South Wales may need to deal with the dissolution of same-sex marriage.[381] In legal advice prepared for the Department of Attorney General and Justice, Mr Jackson made this point unequivocally:

> The State law providing for same-sex marriages would have to make provision for dissolution of such marriages. They are clearly not marriages which could be dissolved pursuant to the *Family Law Act 1975*.
>
> The rights of the parties who had married under such a law upon dissolution of the marriage would have to be provided by such a law.[382]

376 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 4, p 3; Submission 1254, p 7; Submission 1255, pp 6-7; Submission 1257, p 51.

377 Submission 1254, p 7; Answers to supplementary questions 6 March 2013, Professor Lindell, Question 4, p 3.

378 Answers to supplementary questions 6 March 2013, Professor Lindell, Question 4, p 3.

379 Submission 1254, p 7; Submission 1255, pp 6-7.

380 Submission 1255, pp 6-7.

381 Submission 102, p 12; Submission 1240, p 12.

382 Submission 1240, p 12.

7.54 Advocating a slightly different approach, Mr Puplick and Mr Galbraith suggested that in the first instance the New South Wales same-sex marriage law should address issues arising from the dissolution of a same-sex marriage in the same way as the Commonwealth law does. Failing that, they suggested that amendments should be made to the New South Wales *Property (Relationships) Act*. They explained their suggestions as follows:

> We have recommended that provisions to address issues arising from the dissolution of a same-sex marriage should parallel Part VIII of the Family Law Act, and that these provisions should be included in a single law, as is the case with the Tasmanian Bill.
>
> If this course is not followed, we recommend that the Property (Relationships) Act be amended as follows:
>
> 1. Insert a new section 5AA Same-Sex Marriage, which cross-references the Marriage Equality Act.
>
> 2. Insert a new provision to provide for the child or children of a same-sex marriage.
>
> 3. Insert a new Division 2A in the Property (Relationships) Act, which replicate the relevant sections of the Family Law Act relating to the alteration of property interests and applying these provisions to parties to a same-sex marriage.
>
> 4. Insert a new Division 3A in the Property (Relationships) Act which replicates the relevant sections of the Family Law Act relating to maintenance and applying these provisions to parties to a same-sex marriage.[383]

Can marriage 'equality' be achieved through State law?

7.55 Inquiry participants both for and against same-sex marriage commented that even if New South Wales was to pass a same-sex marriage law, without reciprocal recognition in Commonwealth law, different legal treatment of same-sex relationships would continue.[384] On this basis, some Inquiry participants felt that a state-based law for same-sex marriage could not possibly create 'marriage equality'. In line with this perspective, Professor Twomey made the unequivocal observation that marriage equality is a legal impossibility through State-based legislation:

> I understand that the notion of marriage equality is fundamental to what people are trying to achieve but the reality is if what you are trying to achieve is marriage equality, to be true marriage equality it has to be done under Commonwealth legislation. It will never be true marriage equality if it is done under State legislation because you have two different sorts of marriages.[385]

7.56 Representing Lawyers for the Preservation of the Definition of Marriage, Professor Michael Quinlan stated that 'if such legislation is to be passed to permit a marriage between two people

383 Submission 1257, p 51.

384 See, eg, Professor Anne Twomey, Professor of Law, University of Sydney, Evidence, 6 March 2013, p 3; Submission 1240, p 8; Mr F. Christopher Brohier, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, pp 23-24; Submission 1221, Presbyterian Church of New South Wales, p 3; Submission 1255, pp 6-7.

385 Professor Twomey, Evidence, 6 March 2013, p 3.

of the same sex, then that is a matter for the Federal Parliament.'[386] On this basis, he expressed the view that 'marriage equality' as an argument for a state same-sex marriage law was a misnomer because actual equality with Commonwealth law cannot be achieved:

> If the State were to pass the legislation it … is not giving marriage equality because it is not the same marriage as you get under the Federal legislation. It is a different type of marriage which is subservient in some respects to the Federal version of marriage.[387]

7.57 This perspective was put in even more strident terms by Professor Parkinson. He said that if the goal is marriage equality, then determining the constitutional status of a New South Wales law is moot because real marriage equality simply cannot, as a matter of law, be provided for at a state level:

> It is simply not possible for any State Parliament to deliver what advocates want, which is marriage equality. And this is so whatever version of the bill you produce and whatever interpretation of the Constitution you prefer. … The reason why is that it is impossible to do so because it could only ever change status in relation to State law and not Federal law and many of the most important rights and obligations which flow from marriage, flow from Federal law.[388]

7.58 Professor Lindell remarked that if a law permitting same-sex marriage is to be enacted, it would be legally simpler and better if it was done by the Commonwealth rather than by one or more States. He argued that a Commonwealth law would provide certainty to individuals who rely on it and ensure national uniformity without having to depend upon complicated rules of law to interpret its interstate application:

> Not only is it easier but it would be so much better. …from a purely technical point of view, instead of relying on the complicated Common Law rules of recognising marriages in a foreign jurisdiction, it would be much better to have one Parliament that creates one jurisdiction. … So I reiterate that, from a technical point of view, uniformity has great advantages and reduces uncertainty in people's personal lives.[389]

Committee comment

7.59 The Committee received relatively little evidence about how rights conferred under a same-sex marriage law could be recognised in other Australian jurisdictions. We have relied on the advice of the handful of legal scholars who have provided the Committee with their legal analysis. Despite their explanations, it is impossible for the Committee to have considered all of the legal complexities that might arise. The extent to which a same-sex marriage law would successfully interact with law in other Australian jurisdictions will depend on the content of the law itself. This Chapter has canvassed but a few of the most prominent legal questions addressed in stakeholder submissions and consultation.

386 Professor Michael Quinlan, Member, Lawyers for the Preservation of the Definition of Marriage, Evidence, 6 March 2013, p 26.

387 Professor Quinlan, Evidence, 6 March 2013, p 28.

388 Professor Parkinson, Evidence, 6 March 2013, p 40.

389 Professor Lindell, Evidence, 6 March 2013, p 36

7.60 The Committee is cognisant that the law must often deal with complex matters including, quite frequently, questions about how a state law will interact with the law of other Australian jurisdictions. On the question of interoperability of a New South Wales law for same-sex marriage with law in other Australian jurisdictions, the Committee notes that the legal issues are complex. Because of these complexities, the Committee is of the view that equal marriage rights for all Australians may best be achieved under Commonwealth legislation.

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1016	Confidential
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1215	NSW Council for Civil Liberties
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1218	Engage Celebrants
1219	CANdo - Australia's Voice
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1221	Presbyterian Church of NSW
1222	New South Wales Society of Labor Lawyers
1223	Catholic Diocese of Wollongong
1224	Poly Action Lobby
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1252	Protect Marriage Australia
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1254	Inner City Legal Centre
1255	Australian Human Rights Commission
1256	The Law Society of NSW
1257	Mr Christopher Puplick AM & Mr Larry Galbraith

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Wednesday 6 March 2013 **Macquarie Room** **Parliament House**	Mr Fredrick Christopher Brohier	Founder, Lawyers for the Preservation of the Definition of Marriage
	Professor Michael Quinlan	Lawyers for the Preservation of the Definition of Marriage
	Mr Neville Rochow SC	Lawyers for the Preservation of the Definition of Marriage
	Adjunct Professor A Keith Thompson	Lawyers for the Preservation of the Definition of Marriage
	Professor Patrick Parkinson AM	Faculty of Law, University of Sydney
	Professor Anne Twomey	Professor, Law School, University of Sydney
	Professor George Williams AO	Faculty of Law, University of New South Wales
	Professor Geoff Lindell AM	
Friday 15 March 2013 **Macquarie Room** **Parliament House**	Bishop Peter Comensoli	Auxiliary Bishop of Sydney, Catholic Archdiocese of Sydney
	Miss Mary Joseph	Research and Project Officer, Catholic Archdiocese of Sydney
	Mr Antoine Kazzi	Former research officer, Catholic Archdiocese of Sydney
	Mr Rodney Croome AM	National Director, Australian Marriage Equality
	Reverend Mike Hercock	Member, Australian Marriage Equality
	Mr Malcolm McPherson	NSW Convenor, Australian Marriage Equality
	Mr Geoffrey Thomas	Australian Marriage Equality
	Mr Nicolas Parkhill	Chief Executive Officer, ACON
	Mr Dean Price	Policy Advisor, ACON
	Dr Justin Koonin	Convenor, New South Wales Gay and Lesbian Rights Lobby
	Mr Alastair Lawrie	Committee member, NSW Gay and Lesbian Rights Lobby
	Mr Rocco Mimmo	Founder & Chairman, Ambrose Centre for Religious Liberty
	Mr Graeme Mitchell	NSW State Officer, FamilyVoice Australia
	Dr David Phillips	National President, FamilyVoice Australia

Appendix 3 Tabled documents

Wednesday 6 March 2013
Macquarie Room
Parliament House, Sydney

1 *Margan v President, Australian Human Rights Commission* [2013] FCA 109, decision of the Federal Court of Australia, tendered by Adjunct Professor Keith A Thompson.

Friday 15 March 2013
Macquarie Room
Parliament House, Sydney

2 'Public attitudes towards same sex marriage. Report of research findings.' prepared for The Ambrose Centre for Religious Liberty by the Sexton Marketing Group, November 21, 2011, tendered by Mr Rocco Mimmo.

3 'Public attitudes towards changing the Marriage Act to include same sex marriage. September 2011 Analysis of survey findings.', tendered by Mr Rocco Mimmo.

4 'Public attitudes towards same sex marriage. Fact Sheet', tendered by Mr Rocco Mimmo.

Appendix 4 Answers to questions on notice

The Committee received answers to questions on notice from:

- Professor George Williams AO
- Professor Geoff Lindell AM
- Professor Anne Twomey
- Professor Patrick Parkinson AM
- Lawyers for the Preservation of the Definition of Marriage
- FamilyVoice Australia
- NSW Gay and Lesbian Rights Lobby.

Appendix 5 Minutes

Minutes No. 29
Thursday 6 December 2012
Standing Committee on Social Issues
Members Lounge, Parliament House at 2.10 pm

1. Members present
Mr Blair, *Chair*
Ms Barham
Mr Donnelly
Mrs Maclaren-Jones (*by teleconference*)

2. Apologies
Ms Cusack
Ms Westwood

3. Previous minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No. 28 be confirmed.

4. Correspondence
The Committee noted the following item of correspondence:

Received

- 29 November 2012 – From the Premier of New South Wales, the Hon Barry O'Farrell MP, to the Chair, referring an inquiry into the law governing same sex marriage in New South Wales.

5. Inquiry into Same Sex Marriage Law in NSW
The Chair tabled the following terms of reference received from the Premier, the Hon Barry O'Farrell MP, on 29 November 2012:

To inquire and report on issues relating to a proposed same-sex marriage law in New South Wales, and in particular:

1. Any legal issues surrounding the passing of marriage laws at a State level, including but not limited to:
    a. the impact of interaction of such law with the Commonwealth Marriage Act 1961
    b. the rights of any party married under such a law in other States' and Federal jurisdiction
    c. the rights of the parties married under such a law upon dissolution of the marriage;
2. The response of other jurisdictions both in Australia and overseas to demands for marriage equality;
3. Any alternative models of legislation including civil unions; and
4. Changes in social attitudes (if any) to marriage in Australia.

That the reporting date for the Inquiry be 9 May 2013.

Resolved, on the motion of Ms Barham: That the Committee adopt the terms of reference.

Resolved, on the motion of Ms Barham: That under clause 5(2) of the resolution of the House establishing the Standing Committees dated 9 May 2011, the Chair inform the House of the receipt of terms of reference for an inquiry into same sex marriage laws in New South Wales.

Resolved, on the motion of Ms Barham: That the Chair write to the Premier advising that: the Committee has resolved to adopt the terms of reference; the Committee notes the significant level of interest and

submissions received by the Senate and House of Representatives for inquiries into similar issues, and that the Committee will not commence receiving submissions for the inquiry until appropriate IT infrastructure is in place; and that this delay may impact the Committee's ability to report back by the 9 May 2013 deadline.

Resolved, on the motion of Mr Donnelly: That the Committee defer announcing the inquiry through the Chair's media release, advertising and accepting submissions until such a time as the technological challenges associated with the anticipated volume of submissions have been resolved.

6. Adjournment

The Committee adjourned at 2.32 pm *sine die*.

Miriam Cullen
Clerk to the Committee

Minutes No. 30
Friday 21 December 2012
Standing Committee on Social Issues
Room 1153, Parliament House at 10.30 am

1. Members present

Mr Blair, *Chair*
Ms Barham (*by teleconference*)
Mr Donnelly
Mrs Maclaren-Jones

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That Draft Minutes No. 29 be confirmed.

3. Inquiry into Same Sex Marriage Law in NSW

3.1 Advertising and submission closing date

Resolved, on the motion of Mrs McLaren-Jones: That the inquiry call for submissions be advertised in major metropolitan newspapers in the week commencing Monday 28 January 2013.

Resolved, on the motion of Mrs McLaren-Jones: That the closing date for submissions be Friday 1 March 2013.

Resolved, on the motion of Mrs McLaren-Jones: That the Chair issue a media release announcing the establishment of the inquiry in the week commencing 28 January 2013.

Resolved, on the motion of Mrs McLaren-Jones: That all advertising and public announcements about the inquiry feature the on-line submission tool, and that whilst hard copy and email submissions will be accepted by the Committee, these options will not be advertised.

3.2 Invitations to make a submission

Resolved, on the motion of Mr Donnelly: That the Committee write to the following list of stakeholders informing them of the inquiry and inviting them to make a submission.

Government

- NSW Department of Attorney General and Justice
- Australian Human Rights Commission

Non-Government Organisations

- Amnesty International Australia
- Anglican Church Diocese of Sydney

- Australian Catholic Bishops Conference
- Australian Lawyers for Human Rights
- Australian Marriage Equality
- Australian Marriage Forum
- Catholic Archdiocese of Sydney
- Chinese Methodist Church in Australia
- Coalition of Celebrant Associations
- Council of Social Services NSW
- FamilyVoice Australia
- Federation of Australian Buddhist Councils Inc
- Gay and Lesbian Rights Lobby
- Gilbert and Tobin Centre of Public Law
- Hindu Council of Australia
- Inner City Legal Centre
- Law Council of Australia
- Law Society of NSW
- Lawyers for the Preservation of the Definition of Marriage
- Lutheran Church of Australia
- National Association of Community Legal Centres
- NSW Bar Association
- NSW Council for Civil Liberties
- Parents and Friends of Lesbians and Gays (NSW)
- Public Interest Advocacy Centre Ltd
- Quakers Australia
- Sikh Council of Australia

Expert / academic

- Australian Association of Constitutional Law
- The Hon Michael Kirby AC CMG
- Professor George Williams AO, UNSW Law School
- Professor Anne Twomey, Sydney University Law School
- Prof Geoff Lindell, University of Melbourne Law School

Resolved, on the motion of Mr Donnelly: That members notify the Secretariat of any additional stakeholders they wish to be invited to make a submission by COB Monday 21 January 2013.

3.3 Publishing submissions

Resolved, on the motion of Ms Barham: That the Committee authorises the publication of all submissions to the Inquiry into Same Sex Marriage Law in NSW subject to the Committee Clerk checking for confidentiality, adverse mention and other issues. Submissions identified as containing confidentiality, adverse mention or other issues will then be considered by the Committee.

3.4 Hearing dates

Resolved, on the motion of Mrs McLaren-Jones: That the Committee hold public hearings as part of the Inquiry into Same Sex Marriage Law in NSW on:

- Friday 8 March 2013
- Friday 15 March 2013.

3.5 Reporting Date

Resolved, on the motion of Mrs McLaren-Jones: That the Chair write to the Premier advising him that due to the delay in starting the Same Sex Marriage inquiry until appropriate IT infrastructure is in place to receive the expected high number of submissions, and the current high number of inquiries currently being undertaken in the Legislative Council, the Committee will be unable to report until Friday 26 July 2013.

Resolved, on the motion of Mrs McLaren-Jones: That the report deliberative be held on Monday 22 July 2013.

4. Adjournment
The Committee adjourned at 10.55 am, *sine die*.

Stewart Smith
Clerk to the Committee

Minutes No. 31
Wednesday 6 March 2013
Standing Committee on Social Issues
Macquarie Room, Parliament House at 8.45 am

1. Members present
Mr Blair, *Chair*
Ms Westwood, *Deputy Chair*
Ms Barham (8.49 am)
Ms Cusack (9.06 am)
Mr Donnelly
Mrs Maclaren-Jones

2. Previous minutes
Resolved, on the motion of Mrs Maclaren-Jones: That draft Minutes No. 30 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence:

Received

- 8 February 2013 – Letter from Mr Martyn Hagan, Acting Secretary-General of the Law Council of Australia, to Chair, advising that the Law Council of Australia would not be providing a submission.
- 26 February 2013 – Email from Mr Alastair McConnachie, Deputy Executive Director, NSW Bar Association, to Principal Council Officer, attaching a submission and advising that the NSW Bar Association would not be seeking to give evidence.

Sent

- 21 December 2013 – Letter from Chair to the Premier, the Hon Barry O'Farrell MP, advising that the Committee will be unable to report on the inquiry into same sex marriage law until Friday 26 July 2013.

4. ***

5. Inquiry into Same Sex Marriage Law in NSW

5.1 Submissions
The Committee noted that the secretariat has processed 1230 submissions and that, with the exception of the submissions requesting confidentiality, these submissions have been published under the authorisation of the Committee's resolution of 21 December 2012.

The Committee has received 1146 pro forma submissions in various forms.

Resolved on the motion of Ms Westwood: That the Committee authorise the publication of Submission Nos 1-3, 5, 9-10, 15-18, 20-21, 27-29, 31-33, 37, 39-41, 43, 47, 49, 53-54, 57-58, 62-63, 66, 69-71, 75, 96, 98, 100, 112, 113, 136, 151, 162, 165, 172, 177, 192, 193, 195, 226, 228, 229, 231, 235, 247, 249, 250, 253, 254, 257, 259, 261-265, 270, 276, 279, 288, 293, 296, 298, 301, 306, 309-311, 321, 328, 332, 336, 337, 349, 340, 343, 350, 353-357, 359, 362, 367, 370, 371, 373, 375, 376, 380, 383, 388, 398-400, 402, 408, 410, 411,

413, 417, 418, 421, 422, 424, 428, 431, 432, 437, 438, 440- 442, 444, 452, 454, 459, 471, 472, 475-478, 480, 482, 485, 487, 488, 491, 493-495, 497, 498, 501, 502, 505, 507, 513, 514, 523, 525, 533, 537, 542, 543, 550, 570, 576, 586, 587, 590, 592, 595-599, 601-605, 613, 614, 619, 625-627, 634, 638, 640, 642, 646, 647, 649, 651-656, 658-661, 663, 664, 666, 668, 670, 671, 676-678, 680, 683-686, 688-691, 693-695, 698, 702-704, 707, 714, 716, 719, 726-728, 732, 735, 745, 750, 754, 756, 757, 760, 762, 763, 765, 767, 769, 770, 773, 776-779, 781, 782, 785, 786, 789, 795-798, 802, 804, 806-811, 813-815, 818, 820, 825-828, 830-832, 834, 835, 838-840, 842, 844, 846, 847, 849-851, 852, 854, 855, 857-861, 864, 865, 869, 870, 872, 873, 878-881, 883, 884, 887, 889, 890, 892, 894, 896, 899, 901, 902, 904, 906, 911-913, 920, 923, 925, 929, 930, 933, 935, 936, 939, 940, 944-948,950-952, 954, 956, 959, 961-963, 967-973, 975-977, 979, 981, 984, 985, 987 and 992 with the exception of the name and other identifying details of the author, which are to remain confidential.

Resolved on the motion of Ms Westwood: That Submission Nos 7, 13, 16, 24, 86, 88, 94, 106, 118, 196, 209, 221, 230, 299, 305, 314, 316, 337, 338, 341, 346, 347, 352, 360, 368, 369, 376, 381, 392, 407, 409, 412, 416, 425, 433, 435, 450, 457, 458, 481, 492, 503, 509, 516, 520, 551, 559, 572, 594, 609, 615, 621, 629, 632, 633, 635, 637, 639, 641, 644, 650, 681, 687, 696, 710, 712, 715, 725, 741, 743, 744, 753, 755, 764, 768, 774, 780, 787, 812, 829, 849, 843, 860, 871, 876, 924, 926, 927, 934, 947, 953, 960, 974, 980, 988 and 989 remain confidential.

5.2 Time allocation

Resolved on the motion of Ms Westwood: That the timing of questioning for the hearing will be allocated equally between members.

5.3 Supplementary questions

Resolved on the motion of Ms Westwood: That for the duration of the inquiry into same sex marriage law in New South Wales, supplementary questions may be lodged with the secretariat up to two days following the receipt of the hearing transcript.

Resolved on the motion of Ms Westwood: That for the duration of the inquiry into same sex marriage law in New South Wales, witnesses be requested to return answers to questions on notice and supplementary questions within 21 days of the date on which questions are forwarded to the witness.

5.4 Public Hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and advised that the hearing will be webcast on the Parliament public website.

The following witness was sworn and examined:

- Professor Anne Twomey, University of Sydney Law School

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Professor George Williams, University of New South Wales Faculty of Law

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Neville Rochow SC, Lawyers for the Preservation of the Definition of Marriage
- Mr Christopher Brohier, Lawyers for the Preservation of the Definition of Marriage
- Professor Michael Quinlan, Lawyers for the Preservation of the Definition of Marriage
- Adjunct Professor A. Keith Thompson, Lawyers for the Preservation of the Definition of Marriage

Adjunct Professor A. Keith Thompson tendered the following document:

- *Margan v President, Australian Human Rights Commission* [2013] FCA 109, decision of the Federal Court of Australia.

The evidence concluded and the witnesses withdrew.

The following witness was examined via teleconference:
- Professor Geoff Lindell

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:
- Professor Patrick Parkinson AM, University of Sydney Law School

The evidence concluded and the witness withdrew.

5.5 Tendered documents
Resolved, on the motion of Ms Cusack: That the Committee accept the following document tendered during the public hearing:
- *Margan v President, Australian Human Rights Commission* [2013] FCA 109, decision of the Federal Court of Australia, tendered by Adjunct Professor Thompson.

5.6 Selection of witnesses for the Committee's next hearing
Resolved, on the motion of Mr Donnelly: That members are to provide the secretariat with their suggested lists of witnesses for the Committee's next hearing (on Friday 15 March 2013) by 5:00 pm on Thursday 7 March 2013 and that the list will be finalised via email.

5.7 Treatment of submissions
Resolved, on the motion of Mr Donnelly: That:
- All submissions received by the closing date be accepted and tabled electronically
- Submissions from organisations continue to be processed and published
- No more submissions from individuals, regardless of whether or not they were received before or after the closing date be processed.
- The Committee acknowledge in its report the large community response to its inquiry and thank all those who made a submission regardless of whether it was formally published or not.

Resolved, on the motion of Mr Donnelly: That the Committee place on its website an explanation about submission processing as follows: 'The Committee has received approximately 10,000 submissions and over 1,200 pro forma letters, the largest number ever received by a Committee of the NSW Parliament. The Committee acknowledges the significant interest in its inquiry and thanks all those who have taken the time to make a submission. Given we are due to report by 26 July 2013, it is not possible to process all of the submissions received. The Committee will publish on its website submissions from representative organisations and academics, as well as approximately 1100 submissions from individuals.'

6. Adjournment
The committee adjourned at 1.30 pm until Friday 15 March 2013 at 9:15 am.

Stewart Smith
Clerk to the Committee

Minutes No. 32
Friday 15 March 2013
Standing Committee on Social Issues
Macquarie Room, Parliament House at 9.25 am

1. Members present
Mr Blair, *Chair*
Ms Westwood, *Deputy Chair*
Ms Barham
Ms Cusack (10.15 am)
Mr Donnelly
Mrs Maclaren-Jones

2. Previous minutes
Resolved, on the motion of Ms Barham: That draft Minutes No. 31 be confirmed.

3. ***

4. Inquiry into Same Sex Marriage Law in NSW

4.1 Submissions
The Committee has processed 1254 submissions and, with the exception of the submissions requesting confidentiality, these have been published under the authorisation of the Committee's resolution of 21 December 2012.

Partially confidential
Resolved, on the motion of Mr Donnelly: That the Committee authorise the publication of Submission Nos. 1000, 1011, 1013, 1015, 1018, 1021, 1023, 1024, 1026-1028, 1030, 1031, 1035, 1036, 1039, 1042, 1044-1048, 1051, 1053-1055, 1057-1062, 1073, 1074, 1078, 1080, 1082, 1084, 1087, 1092, 1095, 1096, 1098, 1101, 1103, 1108-1113, 1115, 1116, 1118, 1122, 1124, 1126, 1127, 1129, 1132, 1134, 1137, 1138, 1140, 1142-1145, 1147, 1150, 1152-1154, 1175, 1180, 1183-1185, 1189, 1191-1193, 1196, 1197, 1200, 1202, 1211, 1232, 1233, 1235, 1238, 1239, 1241-1246, 1248 and 1249 with the exception of the name and other identifying details of the author, which are to remain confidential.

Confidential
Resolved, on the motion of Mrs Maclaren-Jones: That Submission Nos. 1003, 1009, 1012, 1016, 1017, 1019, 1032, 1033, 1038, 1064, 1065, 1071, 1081, 1090, 1093, 1094, 1097, 1100, 1104-1106, 1125, 1151, 1171-1173, 1176, 1181, 1186, 1188, 1190, 1195, 1198, 1199, 1212, 1224, 1231 and 1250 remain confidential at the request of the author.

4.2 Public Hearing
Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and advised that the hearing will be webcast on the Parliament's website.

The following witnesses were sworn and examined:

- Dr David Phillips, President, Family Voice Australia
- Mr Graeme Mitchell, NSW State Officer, Family Voice Australia

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Bishop Peter Comensoli, Catholic Archdiocese of Sydney
- Miss Mary Joseph, Catholic Archdiocese of Sydney
- Mr Antoine Kazzi, Catholic Archdiocese of Sydney.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Rodney Croome, National Director, Australian Marriage Equality
- Mr Malcolm McPherson, NSW Convenor, Australian Marriage Equality
- Mr Geoffrey Thomas, Member, Australian Marriage Equality
- Revd Mike Hercock.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Nicolas Parkhill, Chief Executive Officer, ACON
- Mr Dean Price, Policy Advisor, ACON.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Justin Koonin, Co-convenor, NSW Gay & Lesbian Rights Lobby
- Mr Alastair Lawrie, Committee member, NSW Gay & Lesbian Rights Lobby.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Rocco Mimmo, Founder and Chairman, Ambrose Centre for Religious Liberty.

Mr Mimmo tendered the following documents:

- 'Public attitudes towards same sex marriage. Report of research findings.' prepared for The Ambrose Centre for Religious Liberty by the Sexton Marketing Group, November 21, 2011.
- 'Public attitudes towards changing the Marriage Act to include same sex marriage. September 2011 Analysis of survey findings.'
- 'Public attitudes towards same sex marriage. Fact Sheet.'

The evidence concluded and the witness withdrew.

The public hearing concluded at 3:10pm. The public and the media withdrew.

4.3 Tendered documents

Resolved, on the motion of Ms Cusack: That the Committee accept the following documents tendered during the public hearing:

- 'Public attitudes towards same sex marriage. Report of research findings.' prepared for The Ambrose Centre for Religious Liberty by the Sexton Marketing Group, November 21, 2011.
- 'Public attitudes towards changing the Marriage Act to include same sex marriage. September 2011 Analysis of survey findings.'
- 'Public attitudes towards same sex marriage. Fact Sheet.' Tendered by Mr Mimmo.

4.4 Report outline

Resolved, on the motion of Mrs Maclaren-Jones: That the Secretariat prepare a draft report outline for consideration by the Committee.

4.5 Report deliberative date
Resolved, on the motion of Mr Donnelly: That the report deliberative date be Monday 22 July 2013.

5. Adjournment
The Committee adjourned at 3.27pm *sine die*.

Stewart Smith
Committee Clerk

Minutes No. 33
Monday 29 April 2013
Standing Committee on Social Issues
Macquarie Room, Parliament House, Sydney, 10.00 am

1. Members present
Mr Blair, *Chair*
Ms Westwood, *Deputy Chair*
Ms Barham
Ms Cusack
Mr Donnelly
Mrs Maclaren-Jones

2. Previous minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No. 32 be confirmed.

3. ***

4. Inquiry into Same Sex Marriage Law in New South Wales

4.1 Submissions
The Committee noted that the secretariat has processed 1257 submissions and, with the exception of the submissions requesting confidentiality, these have been published under the authorisation of the Committee's resolution of 21 December 2012.

5. ***

6. ***

7. Adjournment
The Committee adjourned at 5.06 pm until 9.20 am, Monday, 6 May 2013 at Parliament House, Sydney.

Ian Young
Clerk to the Committee

Draft Minutes No. 37
Monday 22 July 2013
Standing Committee on Social Issues
Room 1153, Parliament House, Sydney, 10.06 am

1. Members present
Mr Blair, *Chair*
Ms Westwood, *Deputy Chair*
Ms Barham
Ms Cusack
Mr Donnelly
Mrs Maclaren-Jones

2. Previous minutes
Resolved, on the motion of Ms Westwood: That Draft Minutes No. 35 and No. 36 be confirmed.

3. ***

4. Inquiry into same-sex marriage law in New South Wales

4.1 Consideration of Chair's draft report
The Chair submitted his draft report entitled *Same-sex marriage law in New South Wales*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Mr Donnelly: That paragraph 1.12 be amended by omitting the word 'could' and inserting instead the word 'would' in the last sentence, and by inserting the words 'and the institution of marriage' after the words 'religious freedoms' at the end of the paragraph.

Resolved, on the motion of Mrs Maclaren-Jones: That Chapter 1, as amended, be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Donnelly: That paragraph 2.4 be amended by omitting the word 'pervading' and inserting instead the word 'common' before the word' feature' in the last sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 2.6 be amended by inserting the words 'with the support of all the major political parties' after the word 'Parliament' in the second sentence, and by omitting the word 'gazumped' and inserting instead the word 'overtook' after the word 'effectively' in the third sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 2.10 be amended by inserting a footnote at the end of the first sentence to refer to the bill being debated.

Mr Donnelly moved: That paragraph 2.29 be amended by omitting the first sentence and inserting instead the words 'At the time of writing this report, of the 196 countries in the world, 15 had passed legislation to legalise same-sex marriage'.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Ms Cusack: That paragraph 2.29 be amended by inserting a full stop after the words 'the same' in the second sentence, and inserting a new sentence to read: 'In the United States, 13 of 52 states have made same-sex marriage lawful.' after the words 'the same.'

Resolved, on the motion of Ms Cusack: That paragraph 2.29 be amended by omitting the words 'and the United States Supreme Court has handed down two decisions pertaining to same-sex marriage rights in that country.' after the words 'the same' in the second sentence.

Resolved, on the motion of Ms Cusack: That the Table 1 heading be amended by inserting the words 'as at 22 July 2013' at the end of the heading.

Mrs Maclaren-Jones moved: That Table 1 be deleted.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That the following statement and table appearing on pages 14-15 of Submission 1040 (National Marriage Coalition) be inserted after Table 1:

UN Member states that have not legislated for homosexual marriage:

Afghanistan	Botswana	Cuba
Albania	Brazil	Cyprus
Algeria	Brunei Darussalam	Czech Republic
Andorra	Bulgaria	Democratic People's Republic of Korea
Angola	Burkina Faso	Democratic Republic of the Congo
Antigua and Barbuda	Burundi	Djibouti
Armenia	Cambodia	Dominica
Australia	Cameroon	Dominican Republic
Austria	Cape Verde	Ecuador
Azerbaijan	Central African Republic	Egypt
Bahamas	Chad	El Salvador
Bahrain	Chile	Equatorial Guinea
Bangladesh	China	Eritrea
Barbados	Colombia	Estonia
Belarus	Comoros	Ethiopia
Belize	Congo (Republic of the)	Fiji
Benin	Costa Rica	France
Bhutan	Côte d'Ivoire	Gabon
Bolivia	Croatia	Gambia
Bosnia and Herzegovina		Georgia

Germany
Ghana
Greece
Grenada
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
Hungary
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kiribati
Kuwait
Kyrgyzstan
Lao People's
Democratic Republic
Latvia
Lebanon
Lesotho
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta
Marshall Islands
Mauritania
Mauritius
Mexico*
Micronesia
(Federated States of)
Monaco
Mongolia
Montenegro
Morocco
Mozambique
Myanmar
Namibia
Nauru
Nepal
New Zealand
Nicaragua
Niger
Nigeria
Oman
Pakistan
Palau
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Macedonia
Republic of Moldova
Romania
Russian Federation
Rwanda
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the
Grenadines
Samoa
San Marino
Sao Tome and
Principe
Saudi Arabia
Senegal
Serbia
Seychelles
Sierra Leone
Singapore
Slovakia
Slovenia
Solomon Islands
Somalia
South Sudan
Sri Lanka
Sudan
Suriname
Swaziland
Switzerland
Syria
Tajikistan
Thailand

The former Yugoslav	Tunisia	Uruguay
Timor Leste	Uganda	Uzbekistan
Turkey	Ukraine	Vanuatu
Turkmenistan	United Arab Emirates	Venezuela
Tuvalu	United Kingdom	Viet Nam
Togo	United of Republic of	Yemen
Tonga	Tanzania	Zambia
Trinidad and Tobago	United States	Zimbabwe

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That the words 'with Christian/Catholic traditions' be omitted from paragraph 2.30.

Mrs Maclaren-Jones moved: That paragraphs 2.33-2.48 be omitted from the report.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That the word 'Recently' be omitted from paragraph 2.36.

Resolved, on the motion of Mr Donnelly: That paragraph 2.40 be amended by omitting the word 'forbid' and replacing it with the word 'prohibit' in the first sentence.

Mr Donnelly moved: That paragraph 2.44 be amended by omitting the third sentence and quote which reads: 'Justice Kennedy, with whom four other judges agreed, wrote in his decision:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statutes is in violation of the fifth amendment.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Ms Westwood: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Mr Donnelly moved: That the word 'sub-standard' in the second introductory paragraph be omitted and insert instead the word 'inadequate'.

Question put and negatived.

Ms Barham moved: That after paragraph 3.21 the following new paragraph be inserted: 'This view was expressed by Mr McPherson, NSW Convenor, Australian Marriage Equality:

> "I was in a marriage with a woman for 27 years. I take marriage quite seriously. I suppose I am in a position, having been there to understand the difference. Currently in Australia we have two forms of marriage. We have marriage under the Marriage Act and we have de facto marriage through the Family Law Act. For a person of my generation or earlier, de facto marriage had a lower social status. ….. Under de facto legislation there are a whole lot of issues that eth bureaucrats or courts can take into account. What we want to do at least at State level is have our marriages, our relationships, recognized as being equally valid and valuable. Civil unions just does not do that, it is just putting another name on it, whereas if we have marriage at a State level that is the beginning".

He went on to say

> "My ex-wife was able to remarry and marry the man she loves. I do not have the same freedom to do the same. Essentially I am a second-class citizen and my children do not deserve to have a father who is a second-class citizen".

Question put.

The Committee divided.

Ayes: Ms Barham, Ms Cusack and Ms Westwood.

Noes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones.

Question resolved in the negative on the casting vote of the Chair.

Resolved on the motion of Ms Barham: That paragraph 3.21 be amended by omitting the following words and quote 'This view was expressed by Women's Legal Services NSW in their submission:

> WLS NSW submits that civil unions and relationship registers are not an adequate replacement for full marriage equality. Civil unions and relationship registers are *alternatives* to marriage that people may choose to enter into instead of marriage, not a replacement for marriage. We submit that these schemes create a hierarchy of relationship recognition in which heterosexual relationships are privileged. WLS NSW submits that full marriage equality is the only way to ensure equality for all people regardless of the gender of the person with whom they are in a relationship.'

and insert instead the following words and quote: 'Mr McPherson, NSW Convenor, Australian Marriage Equality:

> "I was in a marriage with a woman for 27 years. I take marriage quite seriously. I suppose I am in a position, having been there to understand the difference. Currently in Australia we have two forms of marriage. We have marriage under the Marriage Act and we have de facto marriage through the Family Law Act. For a person of my generation or earlier, de facto marriage had a lower social status. ….. Under de facto legislation there are a whole lot of issues that eth bureaucrats or courts can take into account. What we want to do at least at State level is have our marriages, our relationships, recognized as being equally valid and valuable. Civil unions just does not do that, it is just putting another name on it, whereas if we have marriage at a State level that is the beginning".

He went on to say

> "My ex-wife was able to remarry and marry the man she loves. I do not have the same freedom to do the same. Essentially I am a second-class citizen and my children do not deserve to have a father who is a second-class citizen".

Mr Donnelly moved: That the heading before paragraph 3.28 'A pointless endeavour?' be omitted and insert instead the heading 'An endeavour worth pursuing?'.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Ms Cusack, Ms Westwood.

Question resolved in the affirmative on the casting vote of the Chair.

Resolved on the motion of Mr Donnelly: That the first sentence of paragraph 3.35 be amended by omitting the words 'was surprised to find' and insert instead the words 'found that there was'.

Mr Donnelly moved: That the last sentence in paragraph 3.36 be deleted which reads: 'In our view a civil union scheme adds little to the existing legal system in practical terms.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones,

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Ms Cusack: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Mr Donnelly moved: That the introductory text be amended by omitting the third sentence which reads: 'In general, there was widespread agreement that the institutions of marriage is the voluntary union of two adults to the exclusion of all others' and that the fourth sentence of the introductory text be amended by omitting the word 'pivotal' and inserting instead the words 'heavily contested'.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Ms Cusack, Ms Westwood.

Question resolved in the affirmative on the casting vote of the Chair.

Resolved on the motion of Mr Donnelly: That paragraph 4.2 be amended by omitting the final sentence which reads 'Advocates for same-sex marriage argued strongly that this is the very reason they call for marriage rights over and above any other form of union' and that this sentence be inserted at the end of paragraph 4.1 following the words 'either socially or legally'.

Resolved on the motion of Mr Donnelly: That paragraph 4.2 be amended by inserting the following words after in the second sentence:

'Professor Nicholas Tonti Filippini stated:

'What is at stake in this redefinition is the biological reality of the two in one flesh union between a man and a woman. Biological marriage establishes rights and duties in relation to children because the couple is bound to each other and to the child at every level: genetic, gestational, nurturing, social, physical and spiritual'. (sub 997, p 2.)

Resolved on the motion of Mr Donnelly: That paragraph 4.3 be amended by omitting the words 'is the main' after the word 'marriage' and inserting instead the words 'would be a major'.

Resolved on the motion of Mr Donnelly: That paragraph 4.4 be amended by inserting a new sentence following the first sentence to read 'A reason commonly cited for this was their belief that only the union of a man and a woman has the potential to produce offspring, which is a fundamental part of the purpose of recognising marriage.'

Mr Donnelly moved: That paragraph 4.6 be amended by inserting the words 'by some participants' after the word 'Committee' in the second sentence.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Ms Cusack, Ms Westwood.

Question resolved in the affirmative by the casting vote of the Chair.

Mr Donnelly moved: That paragraph 4.7 be amended by omitting the words 'Like many others' at the beginning of the first sentence.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That after paragraph 4.8 a new paragraph be inserted to read: 'Other participants in the inquiry held a different view. For instance, the Australian Christian Lobby stated that:

Marriage has held its meaning as the union of a man and a woman throughout history. This definition transcends time, religions, cultures and people groups. Even in those societies which accepted or even encouraged homosexuality, marriage has always been a uniquely male-female institution.' (sub 1167, p 4)

Resolved, on the motion on Mr Donnelly: That paragraph 4.19 be amended by omitting the word 'personal' from the first sentence.

Resolved, on the motion of Mr Donnelly: That a new quote be inserted in paragraph 4.19 after the second sentence to read:

'Bishop Comensoli stated that:

Marriage certainly helps to build strong families, and strong families mean a stronger community, as Premier Giddings down in Tasmania has recently remarked. But this strengthening of families and societies depends on ensuring the right kind of sexual union is upheld. That best-practice union is marriage between a man and a woman, for the sake of the children that they have. Parliaments like the New South Wales Parliament have a duty to ensure that what makes for best practice is enshrined in law.'

and that the existing quote from the Clarence Branch of the Christian Democratic Party becomes a new paragraph 4.20.

Resolved on the motion of Mr Donnelly: That paragraph 4.22 be amended by omitting the word 'many' in the first sentence after the word 'received' and replacing it with the words 'a large number of'.

Mr Donnelly moved: That a new paragraph be inserted after paragraph 4.28 to read:

While noting Professor Williams' reference to a Federal Court decision which rejected arguments that procreation is one of the 'principal purposes of marriage', the Committee notes that there are a number of

High Court cases which, in their discussions of marriage, propagate the view that historically, marriage is an institution regulated by the Government in the interests of protecting children.

For example, in his deliberations on marriage generally, former Chief Justice Gleeson stated that:

The structure of marriage and family is intended to sustain responsibility and obligation. In times of easy and frequent dissolution of marriage, the emphasis that is placed on the welfare of children reflects the same purpose.

Question put and negatived.

Resolved, on the motion of Mr Donnelly: That paragraph 4.36 be amended by omitting the word 'mixed' and inserting instead the words 'a range of' after the word 'received' in the first sentence.

Resolved, on the motion of Mr Donnelly: That a new paragraph be inserted after paragraph 4.37 to read: 'Some participants expressed the view that same-sex marriage would have a significant impact on society. For example, Mr Martin Fitzgerald stated that:

> Changing the definition of marriage to include same-sex partnerships is not a move towards equality in marriage but a deconstruction of what marriage is.'

Resolved on the motion of Ms Cusack: That a new paragraph be inserted after paragraph 4.44 to read: 'Mr Geoffrey Thomas, member of Australian Marriage Equality, stated that:

> …why should my son and my family be hurt by a government that purportedly is there to represent them? Without putting too fine a point on it, I went to Vietnam because I believed in this democracy and I was 18 years of age... But I believed passionately in the ideal of what being Australian is all about. We hear it every day, do we not? It is all about equality, mateship—all that sort of stuff. What you are talking about is a group of people who do not want to give this group of people acceptance in their own country.'

Resolved on the motion of Mrs Maclaren-Jones: That paragraph 4.45 be amended by:

- inserting the word 'Some' before the word 'advocates' in the first sentence
- omitting the word 'observed' and inserting instead the word 'argued' after the word 'marriage' in the first sentence
- omitting the word 'argued' and inserting instead the word 'said' after the word 'They' in the second sentence.

Mrs Maclaren-Jones moved: That paragraph 4.47 be omitted.

Question put and negatived.

Resolved, on the motion of Mr Donnelly: That paragraph 4.57 be amended by inserting the words ', and that there is still a strong view in the community that marriage is very closely linked to procreation and the founding of a family.' at the end of the paragraph.

Resolved, on the motion of Mrs Maclaren-Jones: That paragraph 4.58, which reads as follows, be omitted:

'The Committee acknowledges the health benefits of marriage, including in relation to mental health'.

Resolved, on the motion of Mrs Maclaren-Jones: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Mr Donnelly moved: That the introductory paragraph be amended by inserting the following sentence after the second sentence: 'Other stakeholders also expressed the view that questions of equality and discrimination beg the question as to the extent of these rights, given that giving same-sex couples the ability to marry would exclude a wide range of other people who could not marry.'

Question put and negatived.

Mr Donnelly moved: That the following paragraph be inserted after paragraph 5.8: 'Other stakeholders submitted that arguing for same sex marriage on the basis of equality and non-discrimination then opens the question anyone else who is not allowed to marry to make the same argument.'

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones.
Noes: Ms Barham, Ms Cusack, Ms Westwood.

Question resolved in the affirmative on the casting vote of the Chair.

Mr Donnelly moved: That the following paragraph be inserted after paragraph 5.11: 'Others argued that it is inherent in the nature of marriage law, which involves not permitting certain types of relationship to be recognised as a marriage, to discriminate, and that it will continue to do so. The question should instead be whether the discrimination is justified or not.'

Question put and negatived.

Ms Cusack left the meeting.

Mr Donnelly moved: That the following paragraphs be inserted after paragraph 5.14:

'If the purpose of the Government regulating marriage is to dilute discrimination against persons, then the question arises again as to whether it ought to be used to dilute discrimination against other types of people who would like to be married.

Indeed, in a response typical of many others, Protect Marriage Australia stated:

> The re-definition of marriage… would also remove any logical argument against the future legalisation of polygamy, the marriage of three or more people. In fact when marriage is reduced to any "two people" or "two partners" there is no justification left to discriminate against three or more people, a group who want to marry.

Miss Veronica Ng also made a submission to a similar effect:

> As we renegotiate the element of marriage that is 'a man and a woman', it becomes difficult to understand why we would exclude any imagined candidate for 'marriage'. In the United States, legalisation of gay marriage has led to calls for polygamy to be legalised, where it is also based on loving, consensual relationships.

The Dads4Kids Fatherhood Foundation submitted:

> Once the definition of marriage is changed where do you stop? The same arguments for so called equality can be used for polygamy and many, many other sexual orientations. The Dads4Kids Fatherhood Foundation believes that the premise of this inquiry is fundamentally wrong and introducing the proposition of an imagined right to 'marriage' by members of the same gender is a biological impossibility in the natural world and is in itself an attack on the importance of gender.'

Question put.

The Committee divided.

Ayes: Mr Donnelly
Noes: Ms Barham, Mr Blair, Mrs Maclaren-Jones and Ms Westwood.

Question resolved in the negative.

Ms Cusack joined the meeting.

Mr Donnelly moved: That the following paragraphs be inserted after paragraph 5.19:

'Other individuals submitted to the Committee their firmly entrenched view that marriage should be between a man and a woman, without citing religious reasons for it. For these people, marriage is by definition a relationship in which procreation could potentially occur.

For example, in a view typical of many, Mr Robert Garrett stated that, he considered that "[m]arriage is the committed union of a man and a woman; it provides a stable social context needed for children of that union to be raised to responsible adulthood.'

Question put and negatived.

Mr Donnelly moved: That the following paragraph be inserted after paragraph 5.31: 'The National Marriage Coalition expressed the view that the religious freedom of those who do not agree with same sex marriage would be further suppressed in other areas of public life, demonstrating that concerns about the limitation of religious freedom extends beyond the issue of ministers being required to solemnise same sex marriage.'

Question put and negatived.

Ms Barham moved: That the following Committee Finding be inserted after paragraph 5.34: 'The Committee finds that the current operation of the *Marriage Act* is discriminatory.'

Question put and negatived.

Resolved, on the motion of Ms Westwood: That Chapter 5, as amended, be adopted.

5. Adjournment

The Committee adjourned at 4:40pm until 2:00pm on Tuesday 23 July 2013, Same-sex marriage law in New South Wales report deliberative.

Stewart Smith
Clerk to the Committee

Draft Minutes No. 38
Tuesday 23 July 2013
Standing Committee on Social Issues
Room 1153, Parliament House, Sydney, 2.09 pm

1. Members present

Mr Blair, *Chair*
Ms Westwood, *Deputy Chair*
Ms Barham
Ms Cusack
Mr Donnelly
Mrs Maclaren-Jones

2. Inquiry into same-sex marriage law in New South Wales

2.1 Consideration of Chair's draft report

Chapter 6 read.

Mr Donnelly moved: That the following heading and subsequent paragraphs be inserted after the introductory paragraphs:

'History of marriage in Australia

> Prior to the establishment of the Commonwealth of Australia in 1901 marriage in the Colony of New South Wales was regulated by legislation and regulation including ordinances. Colonial statutes dealing with divorce and marriage were subject to disallowance by the Imperial Parliament.
>
> The issues of marriage and divorce were considered in some detail during the Constitutional Conventions that were conducted in the 1880s and 1890s prior to Federation.
>
> In 1959 the Commonwealth Parliament considered and passed the Matrimonial Causes Act. The passing of this legislation preceded the codification of national marriage laws.'

Question put and passed.

Resolved, on the motion of Mr Donnelly: That paragraph 6.1 be omitted and insert instead a new paragraph to read: 'In May 1960 the then Commonwealth of Australia Attorney-General, Sir Garfield Barwick introduced into the House of Representatives the Marriage Law Bill. Debate on the Bill was not concluded in 1960 and it was re-introduced in 1961. The unification of the marriage laws in Australia saw nine separate legislative arrangements brought into a single national framework. The Marriage Act 1961 (hereafter 'the Marriage Act') received Royal Assent on 6th May 1961.'

Mr Donnelly moved: That after paragraph 6.1 a new paragraph and quote be inserted to read: 'The Marriage Act enacted in 1961 did not contain a definition of marriage. In the second reading speech dealing with the legislation the Commonwealth Attorney-General said: "… it will be observed that there is no attempt to define marriage in this bill. None of the marriage laws to which I have referred contains any such definition. But insistence on its monogamous quality is indicated by, on the one hand, the provisions of the Matrimonial Causes Act, which render a marriage void where one of the parties is already married, and by a provision in this bill making bigamy an offence."

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.
Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Resolved on the motion of Mr Donnelly: That after paragraph 6.6 a new paragraph and quote be inserted to read: 'That being said, in legal advice to the NSW Department of Attorney General and Justice, Mr Jackson QC noted that:

> "In circumstances when 'marriage' is defined as being the union of a man and a woman, there could not be a more obvious impediment to solemnising a marriage than that the parties of the same sex."

Mr Donnelly moved: That the following paragraph and quote be inserted after paragraph 6.4: 'John Quick and Robert Garran in "The Annotated Constitution of the Australian Commonwealth" note:

> In the Bill of 1891 [draft Constitution], and also in the Adelaide draft of 1897, "Marriage and divorce" was one of the legislative powers … The sense of the desirability of uniform laws of marriage and divorce prevailed, however, and the sub-clause was agreed to. (Conv. Deb., Syd., 1897, pp. 1077-82). At the Melbourne session, before the first report "Marriage" was placed in a separate sub-clause.
>
> Marriage is a relationship originating in contact, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligation, and responsibilities which are determined and annexed to it by law independent of contracts. According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is

> recognized throughout Christendom, and its essence is that it is (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others. (Bethell v. Hildyard, 38 Ch. D. 220.)
>
> Reference - John Quick and Robert Garran "The Annotated Constitution of the Australian Commonwealth", 1901, p 608.

Sir Garfield Barwick, Attorney-General of the Commonwealth of Australia observed in an article published in 1961-1962 edition of the Melbourne University Law Review:

> That the founding fathers of the Commonwealth believed that the fundamental relationship in question [marriage] should be governed by a national law is evident; for, in a list of subjects, notable neither for its width nor for it length, which were to be conceded to the National Parliament, both marriage and divorce were included.
>
> Reference - Sir Garfield Barwick, "The Commonwealth Marriage Act 1961", 3 Melbourne University Law Review 277 1961-1962, p 278.

Question put.

The Committee divided.

Ayes: Mr Donnelly.
Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That after paragraph 6.4 new paragraphs be inserted to read: 'In the case *Attorney-General (Vic.) v The Commonwealth* that was brought before the High Court of Australia in 1962 a number of matters were considered in relation to the *Marriage Act 1961*. One of the judges who decided that case - Taylor J - made the following statements with respect to the purpose of the legislation:

> "The *Marriage Act 1961* is a comprehensive statute enacted pursuant to the power of the Parliament of the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to "Marriage". It contains a great many provisions and its main purpose is to establish uniform marriage law throughout the Commonwealth. …
>
> What must be borne in mind is that the expression with which we are concerned is used to define a broad constitutional power and in the paragraph in question [relating to "marriage" in the Constitution] the word "marriage" – appearing without limitation or qualification – is entitled to as wide an interpretation as it can reasonably bear. … I feel bound to regard the paragraph as justification for the enactment of any law with respect to marriage considered as an institution. That is to say, that it extends not only to laws prescribing the form and requisites of a valid marriage but also to laws defining and regulating the respective rights duties and obligations of the parties *inter se*."

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.
Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That after paragraph 6.4 the following new paragraph be inserted to read: 'In the second reading speech given regarding the Marriage Amendment Bill 2004, Phillip Ruddock, the then Attorney-General of the Commonwealth of Australia stated:

> "It is an important measure that I now introduce. The bill is necessary because there is significant community concern about the possible erosion of the institution of marriage.

> The parliament has an opportunity to act quickly to allay these concerns.
>
> The government has consistently reiterated the fundamental importance of the place of marriage in our society.
>
> It is a central and fundamental institution.
>
> It is vital to the stability of our society and provides the best environment for the raising of children.
>
> The government has decided to take steps to reinforce the basis of this fundamental institution.
>
> Currently, the Marriage Act 1961 contains no definition of marriage.
>
> It does contain a statement of the legal understanding of marriage in the words that some marriage celebrants must say in solemnising a marriage that: 'Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'
>
> The government believes that this is the understanding of marriage held by the vast majority of Australians and they should form the formal definition of marriage in the Marriage Act.
>
> This bill will achieve that result.
>
> A related concern held by many people is that there are now some countries that permit same-sex couples to marry.
>
> The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise samesex marriages entered into under the laws of another country, whatever that country may be.
>
> As a result of the amendments contained in this bill, same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid within Australia.
>
> In summary, this bill makes clear the government's commitment to the institution of marriage.
>
> It will provide certainty to all Australians about the meaning of marriage in the future."

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones
Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That after paragraph 6.7 a new paragraph be inserted to read:

> 'Family Law Act 1975
>
> The Family Law Act was passed by the Commonwealth Parliament in 1975. The legislation does not contain a definition of marriage. However, the *Family Law Act 1975* contains a provision that states the principles upon which the Family Court shall operate. Specifically, section 43 provides:
>
> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;'

Question put.

The Committee divided.

Ayes: Mr Donnelly.

Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones, Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 6.8 be amended by omitting the words 'In a rare unanimity of opinion for this Inquiry,' in the first sentence.

Mr Donnelly moved: That paragraph 6.8 be amended by omitting the word 'unqualified' before the word 'power' in the first sentence.

Question put.

Ayes: Mr Donnelly.
Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones, Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 6.13 be amended by:

- omitting the first sentence which reads 'As outlined above there is no divergence of opinion among legal experts that the NSW Parliament has the power to legislate for marriage.' and inserting instead the words: 'While all experts agreed that New South Wales has the power to legislate in relation to marriage, they similarly agreed, however, that the real issue to be considered is whether a State same-sex marriage law would be inconsistent with the Commonwealth Marriage Act.'
- omitting the word 'However' at the beginning of the second sentence.

Mr Donnelly moved: That after paragraph 6.17 a new paragraph be inserted to read: 'However, this view is premised on the condition that such a law would be required to "not look like marriage" at all. Professor Twomey agreed with Professor Williams that a same-sex marriage Bill could be drafted very narrowly so as to avoid potential inconsistency with the Commonwealth Act. Professor Twomey stated that same-sex marriage legislation would have to be "something separate from 'marriage' (ie. it would not be a matter of 'marriage equality' because constitutionally the two things must be different)". Professor Parkingson agreed that, in order to survive a constitutional challenge, the same-sex marriage legislation would need to create a status that is *not* marriage.

In giving his oral evidence to the Committee, Professor Parkinson stated that:

> I think [SA and NSW bills] would survive a constitutional challenge but that is only if they are sufficiently different from marriage that they are not interfering with the fact that the Commonwealth covers the field and has enacted one uniform national law for the Commonwealth.
>
> …The intention was… to enact one uniform law for the Commonwealth. So it could survive constitutional challenge if it was sufficiently different. I think the bills being proposed are sufficiently different because they not create marriage. They create this new thing called 'same-sex marriage", which is not marriage in law. But the question is the: well, then would you wish to?

Mr Jackson QC provided the same advice, stating that:

> [t]here is, however, a potential problem arising when one endeavours to enact same-sex marriage laws at a State level. The problem arises because, as I understand it, the proponents of legislation of this type seek to arrive at a situation where the relationship between the parties and status of the parties, arrived at by the legislation is the same as that provided for by 'marriage'.
>
> The difficulty with such State legislation in that area, however, is that the more such legislation treats the union to which it applies as the same as marriage, or as having the status of marriage, or treats the parties as 'married', the closer it comes to inconsistence with the Marriage Act.'

Question put.

The Committee divided.

Ayes: Mr Donnelly
Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That paragraph 6.20 be omitted and new paragraphs be inserted instead to read: 'Professor Williams' argument is that by defining marriage as being the union between a man and a woman in 2004, the Commonwealth had actually *unintentionally* limited the scope of the Act to what he terms "different sex marriage". Professor Williams admitted that this outcome is perverse, given the intentions of the then Prime Minister, but argued that this nevertheless appears to be the legal consequences of that parliamentary act.

Other constitutional lawyers disagreed with this argument. Professor Parkinson stated that the fallacy with this thesis is that there are other types of "marriages", that is:

> …that there is such a thing called same sex marriage and there is a thing called heterosexual marriage. There is not. In laws around the world, the only thing you have is marriage. Those laws vary from country to country. Some allow you to marry from age of 12 or 14, some of them allow you to marry partners of the same-sex, but there are not two sorts of marriage, heterosexual and homosexual, or even multiple forms of marriage.
>
> There is one thing called marriage in each jurisdiction which has effects recognised in international law throughout the world with different rules governing that in each jurisdiction. The Commonwealth has a national uniform law on marriage. That national uniform law saws who can marry who, who cannot marry who, what age you have to be to get married and so on.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That paragraph 6.21 be amended by omitting the word 'conundrum' and inserting instead the word 'matter' in the first sentence.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Ms Cusack, Ms Westwood.

Question resolved in the affirmative on the casting vote of the Chair.

Mr Donnelly moved: That after paragraph 6.25 a new paragraph be inserted to read: In Professor Twomey's oral evidence to the Committee, she stated that:

> "If the Constitution says marriage means a particular thing, there is some difficulty with a State law coming along and saying: We are legislating about something that is not marriage in the constitutional sense but we are still calling it marriage… So once you start talking about State marriage equality, you are trying to put the relationship you have established under the State legislation into the same category as the Commonwealth legislation."

Question put.

The Committee divided.

Ayes: Mr Donnelly.
Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That a new paragraph be inserted after paragraph 6.27 which reads:

'Other legal experts noted that existing legislation enacted, through Parliament, reflects the meaning of marriage currently accepted by society. Mr Jackson QC stated in his legal opinion:

> …the Marriage Act clearly intends that only those unions sanctioned by t shall be valid marriages. They exclude specifically same-sex unions. A State law making such unions 'marriages' would be inconsistent with the Marriage Act and, in terms of s 109, invalid.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That a new paragraph be inserted after paragraph 6.55 which reads:

'Lawyers for the Preservation of the Definition of Marriage stated in their submission:

> There can be no doubt that the Marriage Act (including amendments to introduce the definition of *"marriage"* made by the *Marriage Amendment Act 2004*) is a valid enactment of the Commonwealth Parliament… It seems likely that such a Bill [same-sex marriage bill], if passed into law would be found to be directly inconsistent with the *Marriage Act 1961*.

The issue of inconsistency is a matter for adjudication by the High Court.'

Question put.

The Committee divided.

Ayes: Mr Blair, Ms Cusack, Mr Donnelly, Mrs Maclaren-Jones.
Noes: Ms Barham, Ms Westwood.

Question resolved in the affirmative.

Resolved, on the motion of Mrs Maclaren-Jones: That paragraph 6.56 be omitted, which reads: 'At least one stakeholder was cynical about whether the legal issues were really central to this debate.

> I won't waste your time pursuing quasi-legal questions about whether a State can have different laws to other States – as if these kinds of issues were central. In my opinion if something is right it ought to be pursued even if it is inconvenient to individuals or institutions.'

Resolved, on the motion of Mr Donnelly: That paragraph 6.57 be amended by omitting the word '*only*' and inserting instead the word 'definitively' in the first sentence.

Resolved, on the motion of Mr Donnelly: That paragraph 6.69 be amended by omitting the word 'topic' and inserting instead the word 'subject' in the last sentence, and omitting the word 'emphasise' and inserting instead the word 'clarify' in the last sentence.

Mr Donnelly moved: That paragraph 6.70 be amended by omitting the second sentence.

Question put.

The Committee divided

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Mrs Maclaren-Jones: That paragraph 6.70 be amended by omitting the words 'We are grateful to have received the very helpful assistance of' and inserting instead the words 'The Committee received assistance from' before the word 'experts' in the last sentence.

Resolved, on the motion of Ms Westwood: That the Finding which reads: 'The Committee finds that the State of New South Wales has the power to legislate on the topic of marriage. However, should New South Wales choose to exercise this power to enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia. If such a challenge occurs it is uncertain what the outcome of the case would be.

Because of the uncertainties associated with a State-based same-sex marriage law, the Committee finds that a more effective method to achieve equal marriage rights for same-sex couples is through amendment to the Commonwealth *Marriage Act 1961*' be omitted and replaced with a new Finding to read:

'The Committee finds that:

1. The State of New South Wales has the constitutional power to legislate on the subject of marriage.
2. Should New South Wales choose to exercise this power and enact a law for same-sex marriage, the validity of that law could be subject to challenge in the High Court of Australia.
3. If such a challenge occurs it is uncertain what the outcome of the case would be.
4. Equal marriage rights for all Australians may best be achieved under Commonwealth legislation.'

Resolved, on the motion of Mr Donnelly: That the Finding be amended by inserting a semi colon after points 1, 2 and 3 and inserting the word 'and' at the end of point 3.

Ms Barham moved that:

- a new paragraph be inserted as point 3 in the Finding to read: 'If the State was to proceed with same-sex marriage legislation then it could consider the inclusion of a 'savings provision' that stipulates that the legal status of the de facto relationship and the eligibility to register the relationship would be preserved.'
- a new paragraph be inserted as point 4 in the Finding to read: 'If the NSW Parliament passes a law for same-sex marriage then a 'declaration of validity' could be sought from the High Court.'
- a new paragraph be inserted as point 5 in the Finding to read: 'If the NSW Parliament passes a law for same-sex marriage then the State Attorney General could seek cooperation from the Federal Attorney General in seeking a 'declaration of validity' from the High Court.'

Question put.

The Committee divided.

Ayes: Ms Barham.

Noes: Mr Blair, Ms Cusack, Mr Donnelly, Mrs Maclaren-Jones and Ms Westwood.

Question resolved in the negative.

Ms Barham moved that:

- a new paragraph be inserted as a Recommendation after the Finding to read: 'That the NSW Premier write to the Prime Minister advising of the outcome of the Inquiry into Same Sex Marriage Law in New South Wales.'
- a new paragraph be inserted as a Recommendation after the Finding to read: 'That the NSW Premier write to the Prime Minister to request amendment of the Marriage Act 1961 to remove the exclusion reference in Subsection 5(1) that currently defines 'marriage' as the: "*union of a man and a woman to the exclusion of all others, voluntarily entered into for life*" to provide legal certainty for the delivery of state based same-sex marriage legislation.'

Question put.

The Committee divided.

Ayes: Ms Barham.

Noes: Mr Blair, Ms Cusack, Mr Donnelly, Mrs Maclaren-Jones and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That the Finding be amended by inserting a new sentence as a new point 2 to read: 'The Commonwealth Parliament legislated in 1961 for the unification of marriage laws bringing separate legislative arrangements into a single national framework.'

Question put and negatived.

Mr Donnelly moved: That the Finding be amended by inserting a new sentence to read: 'State legislation can not operate to the extent of any inconsistency with Commonwealth legislation.'

Question put.

The Committee divided.

Ayes: Mr Donnelly. Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That the Finding be amended by inserting a new sentence to read: 'Questions of inconsistency are adjudicated by the High Court of Australia.'

Question put.

The Committee divided.

Ayes: Mr Donnelly.

Noes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That the Finding be amended by inserting a new sentence as point 3 to read: 'The Committee believes that it is problematic for the State of New South Wales to legislate on the subject of same-sex marriage.'

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, and Ms Westwood.

Question resolved in the negative.

Mr Donnelly moved: That the Finding be amended by omitting point 4.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Ms Cusack: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved on the motion of Mr Donnelly: That paragraph 7.59 be amended by:

- omitting the words 'most graciously' after the words 'scholars who' and inserting instead the word 'have' in the second sentence.
- omitting the word 'patient' after the words 'Despite their'.
- omitting the word 'will' after the words 'marriage law' and and inserting instead the word 'would' in the fourth sentence.

Mr Donnelly moved: That paragraph 7.60 be amended by deleting final sentence.

Question put.

The Committee divided.

Ayes: Mr Donnelly, Mrs Maclaren-Jones.

Noes: Ms Barham, Mr Blair, Ms Cusack, and Ms Westwood.

Question resolved in the negative.

Ms Barham moved: That paragraph 7.60 be amended by omitting the words 'the most effective way to achieve marriage equality for same-sex couples in New South Wales is through amendment to the Commonwealth Marriage Act' and inserting instead the words 'equal marriage rights for all Australians may best be achieved under Commonwealth legislation.'

Question put.

The Committee divided.

Ayes: Ms Barham, Mr Blair, Ms Cusack, Mrs Maclaren-Jones and Ms Westwood.

Noes: Mr Donnelly.

Question resolved in the affirmative.

Resolved, on the motion of Ms Westwood: That Chapter 7, as amended, be adopted.

Resolved, on the motion of Ms Cusack: That Chapter 5 be recommitted to the consideration of the Committee.

Resolved on the motion of Ms Barham: That after paragraph 5.32 new paragraphs be inserted to read:

The right to marry

The right to marry is enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 23 of the ICCPR recognises the family as the 'natural' and 'fundamental' group unit and stipulates that 'the right of men and women of marriageable age to marry and found a family shall be recognised'. It does not define the words 'marriage' or 'family'.

The Castan Centre for Human Rights Law argued in its submission that Article 23 of the ICCPR is 'ambiguously-worded'. The Centre further contended that it would likely be interpreted in line with changes in social attitudes and in accordance with the other protections the Convention affords, including rights to equality and non- discrimination:

> In international law, it is likely that this change in societal attitudes will be reflected in a move away from the reliance on the traditional interpretation of the right to marriage in the ambiguously-worded Article 23 of the ICCPR, in favour of an interpretation which opens the institution of marriage to all couples, in line with the anti-discrimination provisions of the ICCPR and other international instruments.

Australian Lawyers for Human Rights and others in favour of same-sex marriage reasoned that the right to marry exists "not to protect heterosexual marriage but to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage".

Other stakeholders disagreed with this interpretation. For example, the Catholic Archdiocese of Sydney advocated that the NSW Government uphold human rights but contended that the right to marry enshrines a right exclusive to heterosexual unions due to the implicit interconnection in the Convention between the right to marry and founding a family:

> The State of New South Wales needs to acknowledge and respect the obligations Australia has entered into by signing and ratifying the principal international human rights covenants. The "right to marry and found a family" is affirmed by the Universal Declaration of Human Rights (1948) and international law has always recognised the enduring truth that marriage is a union of a man and a woman oriented to the procreation and nurturing of children. The United Nations Human Rights Committee, for example, which monitors international human rights treaties, has stated that the right to marry "implies, in principle, the possibility to procreate".
>
> The right to marry is a fundamental human right, but it is a unique kind of right - a right that a man and a woman can only fulfil through each other.

Mr Donnelly moved: That after paragraph 5.33 a new paragraph be inserted to read: 'The NSW Government should ensure that the legal rights with respect to exemptions of faith-based schools are considered in the context of passing of same-sex marriage legislation in New South Wales.'

Question put.

Ayes: Mr Donnelly, Mrs Maclaren-Jones

Noes: Ms Barham, Mr Blair, Ms Cusack and Ms Westwood.

Question resolved in the negative.

Resolved, on the motion of Ms Westwood: That Chapter 5, as amended, be adopted.

Resolved, on the motion of Ms Barham: That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House.

Resolved, on the motion of Mrs Maclaren-Jones: That the transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry be tabled in the House with the report.

Resolved, on the motion of Mrs Maclaren-Jones: That upon tabling, all transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and

correspondence relating to the Inquiry not already made public, be made public by the Committee, except for those documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Donnelly: That dissenting statements be submitted to the Secretariat within 24 hours of receipt of the minutes from this meeting.

Resolved on the motion of Ms Cusack: That the secretariat prepare an executive summary that reflects the body of the report and incorporate that summary into the preliminary pages of the final report.

3. Adjournment

The Committee adjourned at 6:15pm until Tuesday 8 October 2013 for a site visit in relation to its inquiry into strategies to reduce alcohol abuse among young people.

Stewart Smith
Clerk to the Committee

Appendix 6 Dissenting statements

Dissenting statement – The Hon Natasha Maclaren-Jones MLC

The inquiry into *Same-Sex Marriage Law in New South Wales* provided an opportunity for Members of the Legislative Council to understand the legal issues associated with passing marriage laws at a State level.

In the committee's report, members made four findings. I am in agreement with finding numbers one, two and three however I do not support finding number four and therefore am unable to agree with the overall findings of the committee.

Findings 1-3 cover the power of the State to make laws in the area of marriage and should New South Wales choose to exercise this power, the validity of any proposed laws, which could and in all likelihood, would be subject to challenge in the High Court of Australia. This is due to the fact that State legislation cannot operate inconsistently with Commonwealth legislation. Any changes made by a State to the definition of marriage, as set out in the *Marriage Act 1961* and subsequently defined in 2004, would be inconsistent with Commonwealth legislation.

Section 51 of the Commonwealth Constitution defines the areas in which the Commonwealth has the power to legislate and make laws on, leaving the States with the legislative control of other matters.

All constitutional experts agreed that New South Wales has the legislative power to make laws in relation to marriage. However, the validity would be called into question due to conflicting Commonwealth legislation and therefore has the potential to negate State legislation.

> "Section 51(xxi) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws with respect to 'marriage'. Section 51(xxii) also gives it power with respect to 'divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants'. These are concurrent powers, meaning that the States can still legislate with respect to these subject matters. However, if there is any inconsistency between Commonwealth and State laws, the Commonwealth law will prevail under s 109 of the Constitution and the State law will be rendered inoperative to the extent of the inconsistency."[1]

Prior to the Marriage Act being enacted in 1961, States and Territory's had control and legislative authority to deal with marriage. In 2004, the then Attorney-General of the Commonwealth of Australia, The Hon. Philip Ruddock introduced amendments to the *Marriage Act 1961,* which enshrined under Section 88EA certain unions that are not marriages:

> A union solemnised in a foreign country between:
>
> (a) a man and another man; or
>
> (b) a woman and another woman;

1 Submission 622, Professor Anne Twomey, Professor of Law, University of Sydney, P1.

must not be recognised as a marriage in Australia.[2]

Furthermore, subsection 5(1) of the *Marriage Act 1961*, defines marriage as a" union of a man and a woman to the exclusion of all others, voluntarily entered into for life".[3]

In making the above amendments to the *Marriage Act 1961*, the Commonwealth Parliament did so in order to give unequivocal definition of marriage in Australia. Whilst States technically retain the power to legislate in this area, it will always be open to legal challenge in the High Court of Australia, if and when State legislation is contradictory to that of the Commonwealth. It is my firm view, based on the evidence provided to the committee, that should New South Wales attempt to allow same sex marriage by way of State legislation, this would not be up-held in the High Court of Australia.

Further, the Committee's report finding number four states:

"Equal marriage rights for all Australians may be best achieved under Commonwealth Legislation"

This finding of the committee is inconsistent with the terms of reference for this inquiry and further remains an emotive statement which is irrelevant to the issue of marriage and its legal recognition and status.

This finding in itself recognises the limited power that States have in relation to legislating in this area. It is my view that this inquiry's primary objective was to look at the legislative authority for the State of New South Wales to deal with marriage as well as other models, taking into account social attitudes to marriage.

2 Marriage Act 1961

3 Marriage Act 1961

Dissenting statement – The Hon Greg Donnelly MLC

Marriage in New South Wales and Australia has always been understood by society and the law as something more, indeed much more, than the public recognition of a committed relationship between two adults for their fulfilment. Marriage has been understood to be both a personal and public relationship that unites a man and a woman with each other and any children born from that union.

In light of the community-wide debate that is presently continuing about marriage and its meaning, this Legislative Council Standing Committee was commissioned by the Premier to inquire into what would be the legal and constitutional issues surrounding the passing of a law in this State that provided for same-sex couples to marry. Other matters were addressed in the Premier's terms of reference but the critical issue was to get to the heart of the legal and constitutional issues. It is my considered opinion that this Report and its Finding ultimately failed to achieve what they were expected to do. I will explain why.

Chapters 2, 3, 4 and 5 make up over half of the Report. They are important and address matters contained in the terms of reference. It could be argued that some of the content goes beyond the inquiry's terms of reference but that is a moot point. I believe that chapters 6 and 7, the key to this Report, are underdone in both their content and analysis. With respect to the Finding, except for point 1 that I agree with, I believe the other points are flaccid, vague and do not reflect the weight and quality of the expert legal advice provided to the Committee through both written submissions and oral evidence.

As will be observed from reading the minutes of the deliberative meetings, held on 22nd and 23rd July 2013 when this Report and Finding was finalised, I attempted to incorporate a significant amount of material to provide a more balanced and accurate presentation of the actual legal and constitutional evidence provided to the Committee.

In terms of the legal and constitutional advice that, in my view, deserved more thorough examination, I specifically cite the following submissions and supplementary submissions:

- Submission No. 102 – Professor Patrick Parkinson;
- Supplementary Submission No. 102a – Professor Patrick Parkinson;
- Submission No. 622 – Professor Anne Twomey;
- Submission No. 623 – Lawyers for the Preservation of the Definition of Marriage;
- Supplementary Submission No. 623a – Lawyers for the Preservation of the Definition of Marriage; and
- Submission No. 1240 - Mr David Jackson QC opinion for the NSW Department of Attorney General and Justice.

In taking into account more accurately this evidence, it is my view that the Committee would have found that in addition to the State of New South Wales having the Constitutional power to legislate on the subject of marriage (a concurrent power shared with the Commonwealth pursuant to Section 51 (xxi) of the Australian Constitution):

- The Commonwealth Parliament legislated in 1961 for the unification of marriage laws bringing together separate legislative arrangements into a single national framework. That law is the *Marriage Act 1961*;

- The Commonwealth Parliament in 2004 passed the *Marriage Amendment Act 2004*. That legislation amended the *Marriage Act 1961* to insert a specific definition of marriage: *"The union of a man and a woman to the exclusion of all others, voluntarily entered into for life"*;
- State legislation can not operate to the extent of any inconsistency with Commonwealth legislation;
- Questions of inconsistency are adjudicated by the High Court of Australia; and
- With the Commonwealth Parliament having expressly legislated on the matter of marriage (not heterosexual marriage, but marriage), it is highly unlikely that if the State of New South Wales legislated on the subject of same-sex marriage, that it would survive scrutiny by the High Court of Australia.

The second reading speech of the then Commonwealth Attorney-General, Sir Garfield Barwick, in 1960 regarding the proposed national marriage legislation is very insightful. In it he outlines that as Australians became more mobile and started to move both temporarily and permanently between states and territories, the issues and difficulties dealing with up to nine separate legislative arrangements with respect to both marriage and divorce, were becoming very burdensome. The issues that were starting to be generated were multiplying and complex. The logic of moving toward a single national framework was becoming both obvious and compelling. The wisdom and value of having a single national marriage framework has been demonstrated over the last 53 years of operation of the *Marriage Act 1961*.

The Commonwealth Parliament passed in 1975 the *Family Law Act*. In my view this clearly consolidated the national legal framework that has been established with respect to marriage and divorce.

The idea of the New South Wales Parliament re-entering the legislative arena with respect to marriage takes the State back to where it was over 50 years ago. It makes no sense.

Moreover, I believe that it is naïve and wishful thinking to believe that with all the work and effort put in over the decades to create a single national framework, the Commonwealth would just sit idly by and allow a state to undo what has been put into place for the benefit of all Australians including those who live in New South Wales.

Such legislation, if it were to pass the New South Wales Parliament, would most certainly be challenged. I believe that the High Court of Australia would find such a legislative initiative invalid and inoperative.

One final point. A number of inquiry participants expressed serious concerns about the potential impact on religious organisations including churches, schools, hospitals, agencies and other services, arising from any marriage legislation for same sex couples passed by the New South Wales Parliament. It is my view that this Report did not adequately consider and deal with these valid concerns. Nor did the Finding contain reference to the concerns, let alone any indication of how they would be addressed.