

STANDING COMMITTEE ON SOCIAL ISSUES

INQUIRY INTO SAME SEX MARRIAGE LAW IN NEW SOUTH WALES

Supplementary questions and answers: Lawyers for the Preservation of the Definition of Marriage and other matters

1. Your submission states that ‘the evidence is clear that alternatives to marriage are not successful by objective measures’. Can you elaborate on this point?
 - *The statement referred to in the question is found at [39] of the submission. Not being sociologists we make the statement on authority.*
 - *The authorities relied on are given at note 11, and we respectfully refer the Inquiry to them. The bibliographical information in relation to “Beyond Rhetoric” is “Beyond rhetoric: a new American agenda for children and families : Final report of the National Commission on Children”; Author United States National Commission on Children; Publisher The Commission, 1991; Original from University of Minnesota Digitized 8 Jun 2009.*
 - *We also refer the Inquiry to the book referenced at note 11 “Maybe I do” and particularly chapters 3 and 4.*
2. On the top of page 25 of the transcript you refer to the Hansard comments of the Hon. Philip Ruddock made in 2004 dealing with the amendment before the House of Representatives relating to the definition of marriage. Can you please provide that Hansard reference and any other relevant Hansard references made at the time?
 - *The Hansard reference is P Ruddock, ‘Second reading speech: Marriage Legislation Amendment Bill 2004’, House of Representatives, Debates, 27 May 2004, p. 29356. Mr Ruddock said:*

In introducing this bill it is important to explain the background to it. This 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 Commonwealth authorised marriage celebrants must say before they solemnise a marriage. Section 46 of the Marriage Act deals with that. Those words are:

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.

It is time that those words form the formal definition of marriage in the Marriage Act.

This bill will achieve that result.

Including this definition will remove any lingering concerns people may have that the legal definition of marriage may become eroded by time.

A related concern held by many people is that there are now some countries that permit same sex couples to marry.

It has been reported that there are a few Australian same sex couples who may travel overseas to marry in one of these countries on the basis that their marriage will then be recognised under Australian law on their return.

Australian law does, as a matter of general principle, recognise marriages entered into under the laws of another country, with some specific exceptions.

It is the government's view that this does not apply to same sex marriages.

The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same sex marriages entered into under the laws of another country, whatever country that 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 entered into, will not be recognised as valid in Australia.

3. With respect to the question you were asked on the top of page 29 of the transcript, can you elucidate your answer with respect to the implications of European Court of Human Rights decisions relating to bigamy and other multiple marriage arrangements?
 - *The question at the top of page 29 was “Having said that, do you feel there could be cases where people could challenge on the grounds of discrimination if they are already in a marriage and want to enter into another marriage, whether it was same sex or with a heterosexual person?”*
 - *Central to the issue of a discrimination argument is whether there is a legally sustainable right. Two decisions of the European Court of Human Rights, in 2010 and 2012 have held that same sex marriage was not a human right under the European Charter of Human Rights (ECHR).¹ This is important as the ECHR follows the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. Therefore one of the premier human rights courts in the world has held that SSM is not a human right. These decisions are instructive to the question of whether those who are in a marriage and want to enter into another are entitled to argue they are being discriminated against. As the decisions are based on the terms of the ECHR (which states that marriage is between a man and a woman) then if the debate is confined to the terms of the legal instruments from which human rights emanate at law, there could be no argument of discrimination. The same would apply to same sex marriage. If however the debate in relation to same sex marriage proceeds on the basis of an alleged right not found in the legal instruments, then there are no boundaries to what may be referred to as discrimination. If love is the criterion then why should bigamists or poly amorists be denied the right to love is the argument that has been put to this Inquiry.²*
4. Please note a corrigendum to [10] of the Submission. The definition of marriage in the *Marriage Act 1961* should read “*marriage*” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.
5. In relation to amendments to the transcript we set out the following extract with the requested amendments marked up.

Mr BROHIER: There are three cases that, with respect, affect the issue of standing. The first goes back some years ago to the case of Croome versus Tasmania. Rodney Croome brought an

¹ *Schalk and Kopf v Austria* (2010) – case of male same-sex couple who wanted state recognition by way of marriage, which was refused. They brought proceedings against the state for contraventions of Articles 12 and 14. It was held there was no breach. The majority found there was no obligation to provide marriage for same-sex couples. The concurring judgment held there was no basis for evolution of rights not expressly conferred by covenants in the instrument;

Gas et Dubois c. France (2012) – lesbian couple refused adoption. They brought proceedings for a breach of Articles 8 and 14. The Court followed *Schalk*.

² Submission No 1224.

action to have the Tasmanian legislation, which made same-sex acts a criminal offence, declared invalid. The Act was not being enforced and there was no danger of it being enforced but the High Court held the fact that it was on the books gave him standing. Then, in the case of Pape, when Mr Pape challenged the cash **flash (splash)** at the time of the global financial crisis, the High Court had a generous interpretation of standing there, partly because it was not challenged to some degree. Lastly, as noted by Professor Williams in his paper, there was a challenge to the school chaplains case. The High Court held that because the State Attorneys (**Attorneys**) General were willing to argue the issue it did not concern itself directly with whether Mr Williams had standing or not. In our respectful submission, it is quite foreseeable that the Commonwealth or one of the State Attorneys (**Attorneys**) General could take this issue up because it needs to be resolved and therefore there would be standing.

Dated 27 March 2013

Lawyers for the Preservation of the Definition of Marriage