Submission No 931

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: NSW Bar Association

Date received: 26/02/2013

The New South Wales Bar Association

10/327

25 February 2013

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

Dear Mr Blair,

Thank you for your email dated 30 January 2013 inviting the New South Wales Bar Association to make a submission into the Inquiry into same sex marriage law in New South Wales.

This submission is in relation to the first of the Committee's Terms of Reference concerning legal issues surrounding the passing of marriage laws at a State level in light of the Marriage Act 1961 (Cth) ("Marriage Act"). The Association is not putting forward a view as to the desirability or otherwise of same sex marriage. This very important social question is primarily a matter for individuals to determine – and to be able to determine.

The Committee's Terms of Reference refer to "the impact of interaction of such law" (ie a New South Wales same sex marriage law) with the Marriage Act. This evokes the operation of sec 109 of the Commonwealth *Constitution*, which in terms provides that –

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

There is a rich jurisprudence in the High Court of Australia explaining the application of sec 109, the details of which are unnecessary for the purposes of identifying the issues relevant to the Committee's Inquiry. It suffices to describe the evident functional purpose of sec 109 as giving paramountcy (subject to Constitutional provisions, of course) to Commonwealth legislation over State legislation.

That constitutional provision is necessary precisely because there are many concurrent legislative powers in relation to their subject matter, about which the States have legislative competence as well as the Commonwealth. Marriage is one of those. Before and after Federation, the former Australian colonies and the new Australian States had marriage statutes which differed one from the other. There were also differences between other British

Selborne Chambers, 174 Phillip Street, Sydney 2000
DX 1204 ◆ Tel (02) 9229 1736 ◆ Fax (02) 9222 9678 ◆ Email president@nswbar.asn.au
www.nswbar.asn.au

ACN 000 033 652 · ABN 18 526 414 014

Imperial jurisdictions, including the United Kingdom itself, among themselves and compared with Australian marriage laws.

In essence, the issue that arises in relation to a proposed State same sex marriage law is whether it is inconsistent with the Marriage Act which does not contemplate same sex marriage. One of the various approaches to the application of sec 109 is to ask whether the State law impairs, detracts from or affects the operation of the Commonwealth law.

Probably, that would involve in this case the particular question whether legislation permitting and regulating same sex marriage collides with or cuts across, in any relevant sense, legislation that permits and regulates marriage between a man and a woman. Self-evidently, there are arguments on both sides of that question. In favour of no inconsistency is the proposition that such a State law governs a field into which the Commonwealth law does not extend. In favour of inconsistency is the proposition that such a State law enacts "marriage" contrary to the definition of that term in the Commonwealth law.

Subsection 5(1) of the Marriage Act defines "marriage" to mean "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". That definition is of course "In this Act", ie for the purposes of reading and understanding the Marriage Act itself.

Other provisions of the Marriage Act show the ways in which and the extents to which the Marriage Act addresses or does not address the respective sexes of marriage partners. The exhaustive grounds on which marriages are void are stipulated in sec 23B in terms that do not mention the partners being of the same sex. One of those grounds is invalidity within the meaning of sec 48. It stipulates that a marriage solemnised otherwise than in accordance with the preceding provisions of the Division in which sec 48 appears is invalid, subject to exceptions that do not expressly relate to the sex of both partners.

One of those exceptions is a failure to comply with the requirements of sec 46. In turn, that provision requires explanation by an authorised celebrant to the effect 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".

Under sec 100 of the Marriage Act, it is a criminal offence to solemnize a marriage or purport to do so if the person who does so has reason to believe that there is a legal impediment to the marriage or if the person has reason to believe the marriage would be void. Clearly enough, given the definition of "marriage" for the purposes of the Marriage Act itself, that offence is committed if a marriage were purported to be solemnized under the Marriage Act between persons of the same sex. There is certainly a legal impediment to that, given the definition. It may also, notwithstanding one possible interpretation of the provisions of secs 23B and 48 noted above, be a void marriage.

On the other hand, it is equally clear that a same sex "marriage" under State law would not be solemnized nor purportedly solemnized under the Marriage Act.

It may be that 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 matters may be parallel without

inconsistency between the State and Commonwealth legislation. If names or words are critical matters, there may be direct inconsistency.

The Association is grateful for the opportunity to make a submission to the Committee on this important issue.

Yours sincerely,

Phillip Boulten SC
President