

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: Women's Legal Services NSW

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Standing Committee on Social Issues
NSW Legislative Council
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

By email: samesexmarriage@parliament.nsw.gov.au

1 March 2013

Dear Committee,

Inquiry into same sex marriage law in NSW

1. Women's Legal Services NSW (WLS NSW) thanks the Standing Committee on Social Issues for the opportunity to comment on the inquiry into same sex marriage law in NSW.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. WLS NSW is in favour of marriage equality in NSW. We support the moves by the NSW Parliament to legislate same sex marriage in this state.

Legal issues surrounding passing of same sex marriage laws at a state level

4. We are aware that there have been questions raised as to the powers of the states to introduce legislation to permit same sex marriage, and refer to a recent article by Professor George Williams of the Faculty of Law at the University of NSW in relation to the constitutional issues of same sex marriage in the context of Australia's federal system of government.¹ Professor Williams concludes that the power to legislate with respect to marriage is not limited to the Federal Parliament and notes that:

There is some doubt whether Federal Parliament could legislate with respect to same-sex marriage at all. Tasmania's Parliament by contrast has a clear power to legislate with respect to marriage in any form.²

¹ George Williams, 'Can Tasmania Legislate for Same-Sex Marriage?' (2012) 31(2) *University of Tasmania Law Review* 117

² Ibid 133

5. Professor Williams goes on to consider the question of whether state legislation would survive a challenge in the High Court and concludes that:

*On balance there are good reasons to believe that a Tasmanian same-sex marriage law could survive a High Court attack.*³

6. We submit that if NSW has the power to legislate on same sex marriage then it should take all legislative and other measures required to ensure equality for all people in NSW regardless of sexual orientation.

Response of other jurisdictions to demands for marriage equality and changing social attitudes to marriage

7. Over the past several decades we have seen an increasing shift towards removing discrimination on the basis of sexual orientation and gender identity. We have seen many countries pass legislation to recognise same sex marriage and other Australian states have proposed bills to legislate same sex marriage. This push towards removal of discrimination in the law reflects changing societal attitudes towards people in same sex relationships, as can be seen in the widespread public support for same sex marriage in polling⁴
8. WLS NSW submits equality and non-discrimination are fundamental principles of international law.⁵ We note the decision of *Toonen v Australia* in which the United Nations Human Rights Committee found the reference to "sex" in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights (ICCPR)* to include sexual orientation.⁶ WLS NSW submits that a human rights analysis based on the principle of equality and non-discrimination supports the recognition of same-sex marriage.
9. We further refer to Australia's Universal Periodic Review appearance before the United Nations Human Rights Council in January 2011. This is a peer review of each United Nations Member State's human rights records undertaken by United Nations Member States. We note that Colombia, Switzerland and New Zealand recommended Australia prohibit discrimination on the basis of sexual orientation and gender.⁷ The United Kingdom recommended Australia take measures to ensure consistency and equality across individual States in recognising same-sex relationships.⁸

³ Ibid

⁴ A Galaxy Research poll commissioned by Australian Marriage Equality showed support for same-sex marriage at 64 per cent. See Jessica Wright, 'MPs to debate same-sex marriage bill' *Sydney Morning Herald* 20 August 2012 at: <http://www.smh.com.au/opinion/political-news/mps-to-debate-samesex-marriage-bill-20120820-24hcy.html#ixzz2MGIzhgNt> accessed on 1 March 2013

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), ratified by Australia 13 August 1980, entered into force for Australia 13 November 1980, Articles 2, 3, 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), ratified by Australia 10 December 1975, entered into force for Australia 10 March 1976, Articles 2, 3, 10.

⁶ *Toonen v Australia* (488/1992) UN Doc. CCPR/C/50/D/488/92 at paragraph 8.7, accessed on 1 March 2013 at: <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>

⁷ UPR Recommendations 86.66-86.68 respectively in *Report of the Working Group on the Universal Periodic Review, Australia*, A/HRC/17/10

24 March 2011 at 5 accessed on 2 April 2012 at: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx>

⁸ UPR Recommendation 86.69

Alternative models of relationship recognition including civil unions

10. 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.
11. WLS NSW urges the Committee to lead the way in legislating for marriage equality as a matter of priority. We regard this as an important step forward in ensuring that all people are treated equally regardless of their sexual orientation or gender identity.
12. If you would like to discuss any aspect of this submission, please contact Mari Vagg, Solicitor or Janet Loughman, Principal Solicitor on

Yours sincerely,
Women's Legal Services NSW

Mari Vagg
Solicitor