

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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14 March 2013

The Hon. Niall Blair MLC
Committee Chair
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

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

Dear Mr Blair

Inquiry into same sex marriage law in NSW

Please find attached a submission from the Human Rights Committee (HRC) and Family Issues Committee (FIC) of the Law Society of NSW (together referred to as "the Committees") in response to the Inquiry into same sex marriage law in NSW.

The HRC is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly. The FIC focuses on all areas of family law and children's issues.

In providing this submission, it should be noted that the Law Society of NSW has not sought the views of the wider population of solicitors across the State. As in the general community, views will differ amongst members of the legal profession on the issues raised by this Inquiry.

The Committees thank you for the opportunity to provide comments.

Yours sincerely,

John Dobson
President

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



Law Council
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JOINT SUBMISSION OF THE HUMAN RIGHTS AND FAMILY ISSUES COMMITTEES OF THE LAW SOCIETY OF NSW

Summary of the Committees' views

For the reasons set out below, the HRC's view is that the NSW Parliament has the power to legislate in relation to same sex marriage, and that a carefully drafted law allowing for same sex marriage in NSW could withstand Constitutional challenge. To this point, the HRC notes that prior to the passage of the *Marriage Act 1961* (Cth), it was the States that regulated marriage. The HRC notes also its view that marriage as a form of relationship recognition should be available to same sex relationships if it is available to different sex relationships. This approach upholds the fundamental human right of equality as set out in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory. Furthermore, NSW would be joining a growing number of jurisdictions removing discrimination against same sex couples. Recent research also demonstrates that the majority of Australians, including Christian Australians, support same sex marriage.

The FIC acknowledges that a High Court decision is needed to resolve the question of whether or not the amendments made to the *Marriages Act 1961* in 2004 constitute an effective prohibition on same-sex marriages. However, the FIC notes that there is now much greater acceptance of the diversity of family structures within the Australian community including recognition by the Commonwealth Government of same-sex marriages entered into abroad. The FIC also wishes to highlight the likely benefits that recognition of same-sex marriages will have for children born to same-sex couples.

The Committees respond to the specific issues raised in the Terms of Reference below.

1. Legal issues passing marriage laws at State level

In relation to question 1(a) of the Terms of Reference, the HRC notes that the Federal Parliament's power to legislate in relation to marriage is not a power exclusive to the Federal Parliament. Rather, section 51(xxi) of the Constitution falls under the category of concurrent powers, allowing Federal and State Parliaments to pass laws on marriage. The HRC notes the view of Professor George Williams that whether the Federal Parliament's power to legislate in relation to marriage extends to same sex marriage is an open question that only the High Court can settle.¹ That is, 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. The HRC notes that until 1976, divorce laws generally in NSW were State laws.

If the High Court took the view that the correct interpretation of "marriage" is what applied at Federation, it would likely interpret the Federal Parliament's marriage power to be confined to marriage between a man and a woman. In that case the Federal Parliament would have no power to legislate for same sex marriage and it would be open to States to legislate in relation to same sex marriage.

¹ George Williams, "Can Tasmania Legislate for Same-Sex Marriage?" (2012) *The University of Tasmania Law Review* 31(2) at p.120

If the High Court takes an evolutionary approach to the interpretation of "marriage", such that it included same sex marriage, the HRC's view is that it would find that the Federal Parliament does have power to legislate in relation to same sex marriage.

In that case, the question of whether a State law on same sex marriage is inoperative to the extent of the inconsistency under section 109 of the Constitution would have to be considered. This question is one that the courts would have to resolve, but the HRC notes several issues in this respect. In discussing the Tasmanian *Same Sex Marriage Bill 2012*, Professor Williams notes that situations of direct inconsistency can be avoided by narrow drafting.² For example, the Tasmanian Bill would appear to avoid situations of direct inconsistency as under that proposal, there would be no possibility of a person being married at the same time under both State and Federal Acts; and that Bill did not seek to impose Federal recognition of Tasmanian marriages.³ The HRC submits that it would be for the other States to determine whether a State Act would be recognised, but in considering this question, courts would need to take account of the "full faith and credit" provision of the Constitution (section 118).

In relation to the question of indirect consistency, if it was found that the Federal Parliament is able to legislate on same sex marriage, then it could be argued that a State law might be inconsistent if the Federal legislation "covers the field" and is therefore inoperative.

However, it could also be argued that the Federal Parliament did not intend to "cover the field" as the *Marriage Act 1961* relates only to different sex marriage. Professor Williams premises this argument on the fact that the *Marriage Act 1961* was amended in 2004 to make clear that, for its purposes, marriage only means "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."⁴ If this is the case then the *Marriage Act 1961* does not "cover the field" because it does not relate to same sex marriage, and a State law to this effect would not be inconsistent. The HRC's view is that this argument is to be preferred.

In summary, the HRC notes that the Constitutional issues may be unclear, but only insofar as it relates to the question of whether Federal Parliament does in fact have the power to legislate in relation to same sex marriage, and if it does, whether the *Marriage Act 1961* does in fact cover the field on the issue of marriage. In the HRC's view, what is clear is that State Parliaments do have the power to legislate on same sex marriage, so long as the legislation is carefully drafted to avoid inconsistency with the Federal legislation.

In relation to questions 1(b) and 1(c) in the Terms of Reference, assuming that an Act allowing for same sex marriage in NSW was passed, and was Constitutionally valid, the HRC notes that it could contain provisions allowing for the dissolution of such a marriage. In addition, in relation to matters involving children, the State's powers relating to children have already been referred to the Commonwealth and for this reason the Family Court and other Federal Courts dealing with children's matters already have jurisdiction so it may not be necessary to make such laws. The HRC notes that the *Family Law Act 1975* (Cth) already deals with the division of property between former same sex partners, so State legislation in that respect may also be unnecessary.

² Ibid. at p.127

³ Ibid.

⁴ Ibid at p.130

The FIC agrees that, from a strict legal perspective, it cannot be stated that the 2004 amendments to the *Marriage Act 1961* constitute an effective prohibition on same-sex marriage. Determination by the High Court is needed to resolve obvious problems in relation to the recognition of same-sex marriage under the State law by Federal courts exercising Commonwealth powers under Federal legislation, for example, rights in relation to property and/or in relation to children under the *Family Law Act 1975*. The amendment of the *Commonwealth Powers (De Facto Relationships) Act 2003*, under which the NSW Parliament referred its power to make laws concerning maintenance and property division for parties to a de facto relationship, may also require amendment. There is the issue of recognition of the rights of a party married under such a State law under the laws of a different State or Territory. Further, the question of divorce, as a separate head of power under section 51 of the Constitution, would separately require a determination by the High Court as to whether the Commonwealth's powers in relation to divorce "covered the field" or whether they could be exercised concurrently by the Commonwealth and States.

From a practical perspective, the FIC notes that the promotion of further duality in the family law system in Australia may arguably be a retrograde step. The FIC and experienced family lawyers across Australia have been promoting the ideal of a unified national family law system for more than 20 years, as difficult or slow as that may be to achieve within a Federal legal system. The creation of further duality within the family law system is not however regarded as a sufficient argument to delay legislative change in respect of same-sex marriage if a State Parliament happens to legislate before the Commonwealth Parliament.

2. The response of other jurisdictions both in Australia and overseas to demands for marriage equality

New South Wales would not be the first jurisdiction to remove discrimination against same-sex couples by allowing same-sex marriage. Jurisdictions such as Canada, South Africa, Spain, Sweden, Netherlands, Iceland, Norway, several states in the United States, Argentina and Portugal already allow same sex marriage. There is currently a same sex marriage bill before the New Zealand Parliament.

Within Australia, the HRC has noted previously in this submission that a same sex marriage Bill was introduced in Tasmania (but was ultimately defeated), and indications of support for State level same sex marriage legislation have been made in South Australia and the Australian Capital Territory.

The FIC notes that since 1 February 2012 the Commonwealth Government has allowed Certificates of No Impediment (CNI) to be issued to Australians wishing to be married to their same-sex partner overseas. The issue of a CNI allows same-sex couples to take part in a marriage ceremony overseas and to be recognised as being married according to the laws of that overseas country. A same-sex marriage will be prima facie evidence of a de facto relationship for the purposes of a civil union under some State and Territory laws.⁵

3. Any alternative models of legislation including civil unions

The HRC submits that if civil marriage is a form of recognition of relationships available to different sex relationships, then it should be available also to same sex relationships. This view is informed by the key human rights principle of equality

⁵ <http://www.dfat.gov.au/publications/consular-operations-handbook/part5.html>

before the law and is set out in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) (to which Australia is a signatory):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In *Toonen v Australia*⁶, the UN Human Rights Committee expressed its view that the reference to "sex" in Article 26 is to be taken to include sexual orientation. In *Young v Australia*, the UN Human Rights Committee found that Australia violated Article 26 by denying Mr Young "a pension on the basis of his sex or sexual orientation."⁷ The Committee's view is that if civil marriage is recognised only between opposite-sex couples, it is strongly arguable that this amounts to discrimination against same-sex couples on the basis of sexual orientation and is therefore a violation of Article 26 of the ICCPR.

The HRC echoes the point made by the Australian Human Rights Commission that recognising the right to enter into civil marriage for all Australians does not restrict any other human right. The HRC's view is that marriage celebrants with religious affiliations should be able to refuse to perform ceremonies inconsistent with their religious beliefs.⁸

The FIC notes that the option of legislating to allow for civil unions as a separate type of institution which is similar to, but not the same as, marriage is an option which has been taken up in other jurisdictions. Given that it is possible in New South Wales to register the existence of a de facto relationship, it is questionable whether the option of a civil union, however it might be formalised or officiated, offers anything more than what has been achieved through the raft of law reforms which have largely removed legal discrimination against members of same-sex couples from areas of the law, with the exception of the right to marry.

4. Changes in social attitudes (if any) to marriage in Australia

The HRC suggests that the contemporary understanding of "marriage" is likely to include same sex marriage. The HRC notes that recent national opinion polls provide strong and consistent evidence that the majority of Australians support marriage equality, and that this support is likely to be enduring.

A Newspoll survey conducted in November 2010 found that 65% of the respondents polled had "no problem" with allowing same-sex marriage. Similarly, national Neilson surveys from November 2010 and March 2011 show 57% support for same-sex marriage.⁹ Even allowing for religious beliefs, 53% of Christians polled by Galaxy

⁶ (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7]

⁷ *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, [10.4]

⁸ Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 10 September 2009 at p 8. Available online:

http://www.hreoc.gov.au/legal/submissions/2009/20090910_marriage_equality.pdf (Accessed 20 January 2012).

⁹ Australian Marriage Equality, Marriage equality and public opinion, Fact Sheet, available online: <http://www.australianmarriageequality.com/wp/wp->

Research conducted in August 2011 supported same-sex marriage.¹⁰ 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%).¹¹ 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.¹² This suggests that support for marriage equality reflects a social value that is likely to become an enduring mainstream norm.

Further, while it is sometimes assumed that only people in a particular group or demographic display majority support for marriage equality, the HRC notes that this assumption does not appear justified. Polling showed that 59% of rural and regional dwellers support marriage equality, 57% of men support marriage equality, and 57% of blue-collar workers also support marriage equality.¹³

The HRC notes further that while it is sometimes argued by opponents of same sex marriage that the issue of marriage discrimination affects only a minority of Australians, it is still a very significant minority. The Australian Bureau of Statistics ('ABS') 2009 Australian Social Trends Report¹⁴ outlined that in the ABS Census 2006 approximately 0.4% of Australians reported that they were in same-sex relationships, (approximately 50,000 people), an increase from the figure of 0.2% reported in 1996. Despite the increase, the ABS still considered the 2006 figure to be an under-estimation as people may be reluctant to identify as being in same sex relationships, or may have not been aware that same sex relationships would be counted in the census.¹⁵

The FIC agrees that there has been a significant shift in social attitudes towards same-sex marriage and greater acceptance of the diversity of family structures within the Australian community more generally. The FIC considers that there are benefits that recognition of same-sex marriage will have for children born to same-sex couples. From a child-focused perspective, the ability of same-sex couples to enter into ceremonial marriage will to an extent normalise their family life in circumstances where many such children will have been born as a result of artificial reproductive technologies and may already feel different by virtue of the means by which they were conceived.

[content/uploads/2010/10/AMEpollfactsheet@Jun11.pdf](#) (accessed 21 March 2012) cited in Gareth Griffith, "Same-sex marriage briefing paper no. 3/2011," July 2011, NSW Parliamentary Library Research Service, at p 1 available online:

[http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Same-sexmarriage/\\$File/SAME-SEX+MARRIAGE+BP.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Same-sexmarriage/$File/SAME-SEX+MARRIAGE+BP.pdf) (accessed 21 March 2012)

¹⁰ Galaxy Research Poll 5-7 August 2011 Commissioned by Australians for Marriage Equality. Available online: <http://www.australianmarriageequality.com/wp/wp-content/uploads/2011/08/marriagereligion.pdf> (accessed 21 March 2012).

¹¹ See note above.

¹² See note above.

¹³ Australian Marriage Equality, Marriage equality and public opinion, Fact Sheet, available online: <http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/10/AMEpollfactsheet@Jun11.pdf> (accessed 21 March 2012)

¹⁴ Australian Bureau of Statistics, 4102.0 Australian Social Trends March 2009, 25 March 2009, available online: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20March%202009> (accessed 21 March 2012)

¹⁵ See note above.